165-443

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 7, Original.

EX PARTE: IN THE MATTER OF JOHN CHETWOOD, JR., PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

FILED DECEMBER 26, 1896.

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1 In the Supreme Court of the United States.

In the Matter of JOHN CHETWOOD, JR., Petitioner.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court:

In compliance with the order to show cause issued out of this court on the 7th day of December, 1896, a certified copy of which is hereto annexed, marked "Exhibit 1," the undersigned, judge of the district court of the United States in and for the northern district of California, but sitting, for the purposes of the action hereinafter referred to and making this return, as judge of the circuit court of the United States in and for the ninth circuit and northern district of California, respectfully returns and represents as follows:

Heretofore, to wit, on the 16th day of October, 1896, in an action then and now pending in said circuit court, wherein T. K. Stateler was and is complainant and The California National Bank of San Francisco, a national bank, and John Chetwood, Jr., were
2 and are defendants, there was presented to this court the affidavit of the complainant; and thereupon the court made its order requiring the parties therein named, to wit, John Chetwood, Jr., defendant therein, and his attorneys, Thompson & Thompson and E. G. Knapp, to be and appear before said court on October 20, 1896, at 11 o'clock a. m., and then and there show cause why they should not be adjudged guilty of contempt of the said circuit court for the commission of the acts complained of in said affidavit; which said affidavit and order were thereupon and on said date served at San Francisco, California, upon the parties named in said order, and which said affidavit and order, together with the affidavit of service thereof, were on the 17th day of October, 1896, filed in the clerk's office of this court, a true copy of which said affidavit, order to show cause, and affidavit of service is hereto attached, marked "Exhibit 2." On October 20, 1896, the hearing of said order to show cause was continued, with the consent of all parties in interest, to October 27, 1896, at 11 o'clock a. m.; and thereafter and on said last named date the hearing of said order to show cause was again continued, with the consent of all parties in interest, to November 10, 1896, at 11 o'clock a. m.

On the 6th day of November, 1896, there was presented to this court a second affidavit of the complainant in said action; and thereupon this court made its further order requiring the parties therein named, to wit, John Chetwood, Jr., defendant therein, and his attorneys, E. G. Knapp and A. W. Thompson, and W. K. Vanderslice, the president, and Charles H. Holt, the vice-president, of the defendant bank, to be and appear before said court on the 10th day of November, 1896, at 11 o'clock a. m., and then
3 and there show cause why they should not be adjudged guilty of contempt for the commission of the acts complained of in said second affidavit; and thereupon and at the same time made its further order shortening the time of serving said last-

named order to show cause to two days, which said affidavit, order to show cause, and order shortening time of service were thereupon and on said last-named date served at San Francisco, California, upon the parties therein named, except Charles H. Holt, who, by reason of his absence from the State of California at that time, has never been served, and which said affidavit, order to show cause, and order shortening time of service thereof, together with the affidavit of service, were, on the 7th day of November, 1896, filed in the clerk's office of this court, a true copy of which said last-named affidavit, order to show cause, order shortening time of service, and affidavit of service is hereto attached, marked "Exhibit 3."

On the 10th day of November, 1896, the hearing of both of said orders to show cause was continued until the 18th day of November, 1896, at 11 o'clock a. m., on which last-named day and at the hour of 11 o'clock a. m. the hearing of both of said orders to show cause was commenced, all parties in interest consenting that said orders to show cause be heard together.

The complainants thereupon introduced in support of said orders to show cause the originals of "Exhibit 2" and "Exhibit 3" and the following original papers on file in said action at the time of making each of said orders to show cause:

Order of January 4, 1896, made on the filing of the original bill, requiring the defendants to appear at a time therein desig-
4 nated and show cause why an injunction *pendente lite* should not issue and restraining the commission of the acts complained of pending the hearing of said order to show cause, a true copy of which order is hereto attached, marked "Exhibit 4."

Amended bill, filed January 20, 1896, a true copy of which is hereto attached, marked "Exhibit 5."

Return of defendants to the order to show cause of January 4, 1896, filed February 3, 1896, consisting of the affidavits of John Chetwood, Jr., A. W. Thompson, and W. C. Glass, a true copy of which is hereto attached, marked "Exhibit 6." The exhibits attached to said original return, consisting of copies of affidavits and orders filed in the insolvency proceeding of the said R. P. Thomas in the superior court of Alameda county, State of California, and a copy of the record in said court in the cause pending therein on January 4, 1896, brought by the defendant Chetwood in his own name and the name of the bank against the Standard Soap Company *et al.*, referred to in his said return, are not reproduced here for the reason that they were not referred to on the hearing of said orders to show cause, and their contents are fully recited in said return.

Rebuttal affidavits on behalf of complainant in support of the order to show cause of January 4, 1896, filed February 14, 1896, consisting of the affidavits of complainant and R. B. Mitchell, a true copy of which is hereto attached, marked "Exhibit 7."

The injunction made February 24, 1896, a true copy of which is hereto attached, marked "Exhibit 8."

5 Affidavit of service of injunction, filed February 25, 1896, a true copy of which is hereto attached marked "Exhibit 9."

Answer of the defendants, filed September 8, 1896, a true copy of which is hereto attached, marked "Exhibit 10."

Affidavit of John Chetwood, Jr., filed October 7, 1896, and notice of motion, returnable October 12, 1896, for an order modifying injunction, a true copy of which is hereto attached, marked "Exhibit 11."

Affidavit of complainant in opposition to motion of John Chetwood, Jr., to modify injunction, filed October 12, 1896, a true copy of which is hereto attached, marked "Exhibit 12."

Order denying motion of John Chetwood, Jr., to modify injunction, filed October 12, 1896, a true copy of which is hereto attached, marked "Exhibit 13."

Supplemental bill of complaint, filed under order of court of October 12, 1896, a true copy of which is hereto attached, marked "Exhibit 14."

The decision of the court, Beatty, judge, granting the injunction *pendente lite*, a true copy of which is hereto attached, marked "Exhibit 15."

There *was* thereupon introduced on behalf, respectively, of each of the respondents named in the said orders to show cause
6 and in opposition to said orders to show cause the originals of the following papers:

As to the first order to show cause:

On behalf of Thompson & Thompson, the affidavit of A. W. Thompson, which is not reproduced here for the reason that they were thereafter adjudged not guilty of contempt in committing the acts complained of in said order to show cause.

On behalf of E. G. Knapp, his own affidavit and the affidavit of W. H. Metson, which are not reproduced here for the reason that said E. G. Knapp was thereafter adjudged not guilty of contempt in committing the acts complained of in said order to show cause.

On behalf of John Chetwood, Jr., his own affidavit, filed November 19, 1896, set out in the printed petition herein at page 25.

As to the second order to show cause:

On behalf of A. W. Thompson, his own affidavit, which is not reproduced here for the reason that he was thereafter adjudged not guilty of contempt in committing the acts complained of in said second order to show cause.

On behalf of W. K. Vanderslice, his own affidavit, which is not here reproduced for the reason that he was thereafter adjudged not guilty of contempt in committing the acts complained of in said second order to show cause.

On behalf of John Chetwood, Jr., his own affidavit, filed
7 November 19, 1896, set out in the printed petition herein at page 33.

On behalf of E. G. Knapp, his own affidavit, filed November 18, 1896, a true copy of which is hereto attached, marked "Exhibit 16."

There was no oral evidence taken at said hearing. The foregoing comprises all the papers and documents introduced on said hearing. The further hearing of both said orders to show cause

was thereupon continued until the 19th day of November, 1896, at eleven o'clock a. m., on which said last-named day the hearing of both of said orders to show cause was resumed and finally completed, and were both submitted to the court for decision. Thereupon the court made and rendered its decision, a true copy of which is hereto attached, marked "Exhibit 17;" and thereupon made its order as to the first order to show cause, a true copy of which is hereto attached, marked "Exhibit 18;" and thereupon made its order as to the second order to show cause, a true copy of which is hereto attached, marked "Exhibit 19."

And thereupon it is respectfully submitted whether or not this court should take further proceedings in the said matter.

Witness my hand this nineteenth day of December, A. D. 1896.

WM. W. MORROW,
District Judge.

8 EXHIBIT 1.

Supreme Court of the United States, October Term, 1896.

Ex Parte: In the Matter of JOHN CHETWOOD, JUNIOR, Petitioner.
No. 7, Or'g'l.

On consideration of the petition of John Chetwood, Junior—

It is now here ordered by the court that cause be shown by the circuit court of the United States for the northern district of California and the Honorable W. W. Morrow, judge thereof; R. P. Thomas, and T. K. Stateler, before this court, at Washington, on Monday, January 4, 1897, at 12 o'clock noon, or as soon thereafter as counsel can be heard, why the prayer of said petition should not be granted.

December 7, 1896.

9 Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing are true copies of the petition of John Chetwood, Jr., and the rule to show cause granted thereon in the case entitled *Ex parte:* In the matter of John Chetwood, Jr., No. 7, original, October term, 1896, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 8th day of December, A. D. 1896.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

10 "EXHIBIT 2."

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Bank) and JOHN CHETWOOD, JR., Defendants.

UNITED STATES OF AMERICA,
Northern District of California, } *ss.:*

Thomas K. Stateler, being duly sworn, deposes and says that he is the complainant in the above-entitled action; that on the 24th day of February, 1896, this court, after a full hearing, granted an injunction *pendente lite*, enjoining the defendants The California National Bank of San Francisco, its directors, officers, and employees, and the defendant John Chetwood, Jr., his agents, servants, attorneys, solicitors, or any other representative from, among other things, settling and allowing, or attempting to settle or allow, any attorneys' charges or any other fees, expenses, or costs growing out of, or which it may be claimed grew out of, any past litigation referred to in the amended bill herein.

11 Thereafter and on the 19th day of September, 1896, the said John Chetwood, Jr., caused to be filed in the superior court of the city and county of San Francisco, State of California, in an action then pending therein entitled "John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants," and numbered 30052 on the files of said court, a notice that on the 25th day of September, 1896, at 10 o'clock a. m., he would apply to said court to make an allowance out of the funds on deposit in said court to the credit of the above-entitled action to him for alleged costs, disbursements, expenditures, attorneys' and counsel fees claimed to have been made and incurred by him and about to be made and incurred by him in behalf of the defendant banking corporation and the stockholders thereof, and which said fund belongs to the defendant bank, and which is the fund particularly referred to in the amended bill of complaint herein, a copy of which said notice is hereto attached, marked "Exhibit A," and hereby made a part hereof. Thereafter the hearing of said motion was continued until the 2nd day of October, 1896; whereupon the attention of said superior court was called to the issuance of the injunction out of this court above referred to, and the said superior court thereupon continued the hearing of said motion for allowance two weeks, until the 16th day of October, 1896, at 10 o'clock a. m.; that Mr. W. H. Metson, of the firm of Reddy, Campbell & Metson, who signed said notice, along with Thompson and Thompson, as the attorneys for the plaintiff, stated upon said hearing that he was ignorant of

the issuance of said injunction, and that neither he nor his
12 firm would proceed any further in support of said motion while said injunction stood, and that, as far as affiant knows, the said firm of Reddy, Campbell & Metson have taken no further part in the matter of said motion and are not in any way attempting to defy the order or writ of this honorable court. Thereafter and on the 7th day of October, 1896, the defendants herein filed and served a notice herein that on the 12th day of October, 1896, at 11 o'clock a. m., they would apply to this court for an order modifying the injunction so as aforesaid issued out of this court in this action so as to permit the defendants herein or either of them to apply to said superior court of the city and county of San Francisco for an allowance out of the fund therein belonging to this bank for attorneys' fees and costs. On the 12th day of October, 1896, pursuant to said notice, said motion was heard in open court, and after a full hearing the court made its order denying said motion.

Affiant further states that four days have expired since said last-named date, and the said John Chetwood, Jr., has failed, neglected, and refused to withdraw the motion in said superior court for a further allowance out of said fund, but that said motion is now pending, and that affiant is informed and believes, and therefore avers, that said fund will not be turned over to the statutory agent of this bank while the motion of the said defendant, John Chetwood, Jr., is pending in said superior court for a further allowance out of said fund, and that in maintaining said motion the said John Chetwood, Jr., and his attorneys, Thompson & Thompson,
13 and his counsel, E. G. Knapp, are openly defying the order and writ of this court.

T. K. STATELER.

Subscribed and sworn to before me this 16th day of October, 1896.

EUGENE W. LEVY,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

14 "EXHIBIT 2" (Continued).

"EXHIBIT A."

In the Superior Court of the City and County of San Francisco, State of California.

JOHN CHETWOOD, JR., Pl'ff,
vs.
THE CALIFORNIA NATIONAL BANK *et al.*, Def'ts.

To T. K. Stateler, claiming to be agent of the stockholders of defendant bank, & Pierson & Mitchell & R. A. Friedrich, his attorneys:

You will please take notice that on Friday, the 25th day of September, 1896, at ten o'clock a. m., or as soon thereafter as the matter

may be heard, John Chetwood, Jr., will move this court, in department three thereof, to make an allowance, out of the funds on deposit in said court to the credit of the above-entitled action, to said John Chetwood, Jr., for his costs, disbursements, expenditures, and for attorney and counsel fees on account of services rendered and to be rendered by said Chetwood and attorneys employed by him in behalf of defendant banking corporation and the stockholders thereof.

This motion will be made upon the papers and records on file in this action and upon such oral testimony as may be introduced upon the hearing of this motion, and upon the grounds that said motion is a fit and proper one and that the time is now meet
15 and ripe for making the same.

THOMPSON & THOMPSON,
REDDY, CAMPBELL & METSEN,
Att'ys for Pl'ff.

E. G. KNAPP, *Of Counsel.*

16 "EXHIBIT 2" (Continued).

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Bank) and JOHN CHETWOOD, JR., Defendants.

On reading the annexed affidavit of Thomas K. Stateler, the complainant herein, and on motion of Pierson & Mitchell and Robert A. Friedrich, his attorneys, and good cause appearing therefor—

It is ordered that the defendant John Chetwood, Jr., and his attorneys, Thompson & Thompson, and his counsel, E. G. Knapp, be and appear before this court on Tuesday, the 20th day of October, 1896, at 11 o'clock a. m., then and there to show cause, if any there be, why they should not be adjudged guilty of contempt of this court for disobeying and refusing to obey the injunction heretofore issued by this court in this action and referred to in the annexed affidavit.

This order to show cause will be heard upon the annexed
17 affidavit upon the papers on file herein and the records of this action in this court and such counter-affidavits as may be introduced by the defendants upon the hearing of this order.

Dated October 16th, 1896.

WM. W. MORROW, *Judge.*

18 "EXHIBIT 2" (Continued).

UNITED STATES OF AMERICA,
Northern District of California, } ss:

A. W. Linforth, being duly sworn, deposes and says that at all the times hereinafter mentioned he was a citizen of the United

States over and above the age of twenty-one years and not a party to the above-entitled action.

That heretofore, to wit, on the 16th day of October, 1896, at the city and county of San Francisco, State of California, he duly served the annexed order to show cause, with the affidavit thereto attached, upon the parties named in said order to show cause, to wit, John Chetwood, Jr., and E. G. Knapp, by then and there delivering to each of them a copy of said order to show cause and said affidavit, and on the same day and at the same place duly served Thompson & Thompson, mentioned in said order to show cause, by delivering a copy of said order to show cause and said affidavit to A. W. Thompson, a member of said firm.

A. W. LINFORTH.

Subscribed and sworn to before me this 16th day of October, 1896.

EUGENE W. LEVY,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

Filed October 17, 1896.

19 "EXHIBIT 3."

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Bank) and JOHN CHETWOOD, JR., Defendants.

UNITED STATES OF AMERICA, *Northern District of California,* } *ss:*

Thomas K. Stateler, being duly sworn, deposes and says that he is the complainant in the above-entitled action; that he hereby refers to the amended bill and the supplemental bill on file herein and asks that all the matters therein referred to be considered before this court upon the application for and the hearing of the order to show cause last hereinafter referred to as fully and to the same extent as if such matters were reproduced and specifically set forth in this affidavit.

That on the 5th day of January, 1896, and upon the filing of the bill of complaint herein an order was made upon the defend-
20 ants to appear before this court at a day and hour therein named and show cause why they should not be enjoined *pendente lite* from the commission of the acts complained of in the bill, and in the meantime a restraining order was duly issued and served; that thereafter and on the 24th day of February, 1896, said order to show cause was duly heard, the defendants being represented herein by A. W. Thompson and John Chetwood, Jr., as their

attorneys of record, and that this court thereupon adjudged that the defendant bank was duly adjudicated insolvent by the Comptroller of the Currency on the 14th day of January, 1889, pursuant to the act of Congress of June 30th, 1876, and that one S. P. Young was appointed receiver by said comptroller on said date to take charge of its affairs; that said receiver qualified and entered upon the performance of the duties of his office, and that on the 21st day of February, 1889, he commenced a proceeding in this court submitting himself and said bank to the jurisdiction of this court, and that ever since said date this court has had exclusive jurisdiction of the winding up of said bank; that said receiver has paid off all the debts of the bank, and that on the 6th day of July, 1894, the complainant was duly elected the agent of said bank under the act of Congress of August 3, 1892, to succeed the receiver; that the complainant had duly qualified as such agent and had entered upon the performance of the duties of his office, and that the complainant has ever since been the duly elected, commissioned, qualified, and acting agent of said bank under said last-named act of Congress, and was alone entitled to represent the bank and to collect its assets, and that the board of directors of said association had no authority whatever to represent said bank in any way, manner, or form; and thereupon and on said date an injunction was granted by this court in this action and duly served upon the defendant John Chetwood, Jr., and upon the bank, through Charles H. Holt, its vice-president, and which said injunction prohibited the board of directors of said bank, its officers and employees, and said Chetwood, his agents and servants, and their attorneys, from in any way representing said bank or using the name of said bank, and further prohibited them from commencing any further litigation against the complainant, the agent of the bank, and from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the bank, and from in any way disposing of or encumbering any of the assets, money, or property of said bank.

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Thereafter and subsequent to the matters set forth in the supplemental bill herein the defendant John Chetwood, Jr., and E. G. Knapp and A. W. Thompson, as his attorneys, presented to the Honorable Stephen J. Field, an associate justice of the Supreme Court of the United States, a petition for a writ of error to review the judgment of the supreme court of the State of California in reversing the judgment so as aforesaid recovered by the said Chetwood against the said Thomas, referred to in the amended and supplemental bills herein, and for the purpose of obtaining said writ of error made the respondent bank herein the plaintiff in error and Richard P. Thomas and John Chetwood, Jr., as the defendants in error, and the said Knapp and Thompson signed said petition as the attorneys for said bank and wilfully and fraudulently represented themselves as the attorneys for said bank, in open violation of the injunction so as aforesaid issued on February 24, 1896, in this action, and in contempt of the jurisdiction of

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this court over said bank; that in suing out said writ of error in the name of said bank this affiant is informed and believes that the said Chetwood and Knapp and Thompson had the active co-operation and assistance of W. K. Vanderslice, a member of the board of directors of said bank, and claiming to act as its president, and Charles H. Holt, a member of the board of directors of said bank, and claiming to act as its vice-president, and the party upon whom the said injunction was directly served, as above set forth; and affiant is further informed and believes, and upon such information and belief avers, that the said W. K. Vanderslice and Charles H. Holt, in direct and wilful violation of the injunction and the jurisdiction of this court, have attempted to employ the said E. G. Knapp and the said John Chetwood, Jr., as the attorneys for said bank to further carry on the litigation referred to in the amended and supplemental bills herein, and to prevent said fund from being delivered to this complainant as aforesaid, and in the further carrying out of their contempt-ous conduct became sureties upon the bond filed with said writ of error in the clerk's office of the supreme court of the State of California.

That thereafter and prior to the 22nd day of October, 1896, the said John Chetwood, Jr., and E. G. Knapp, as his attorney, presented to the chief justice of the State of California a petition for a writ of error to the Supreme Court of the United States
23 to review the order of the supreme court of the State of California, which directed the fund in the superior court, referred to in the amended and supplemental bills herein, to be turned over to this complainant as the agent of the bank, and for the purpose of obtaining that writ entitled the proceeding "The California National Bank of San Francisco and John Chetwood, Jr., representative stockholder therein, plaintiffs in error, *vs.* T. K. Stateler (agent), S. P. Young (receiver), (Robert A. Wilson, Richard R. Thompson, and Richard P. Thomas), defendants in error," and falsely and fraudulently represented in said petition that the said E. G. Knapp was the attorney for the said bank, in open and wilful violation of the injunction so as aforesaid issued in this action and in contempt of the jurisdiction of this circuit court over the affairs of said bank. A copy of said last-named petition is hereto annexed, marked "Exhibit A," and hereby made a part hereof, and affiant is informed and believes, and upon such information and belief avers the fact to be, that the said W. K. Vanderslice and the said Charles H. Holt, so as aforesaid the president and vice-president of the defendant bank, in open and wilful violation of the injunction and the jurisdiction of this court, co-operated with the said John Chetwood, Jr., and the said E. G. Knapp and assisted them in applying for said last-named writ of error in the name of this bank, and that the said W. K. Vanderslice filed in the clerk's office of the supreme court the necessary bond when said writ of error was granted to the supreme court, and the legal effect of which bond was to tie
24 up said fund in said superior court until the final disposition of said writ of error.

Affiant further states that the attorney of record for the bank

in the superior court in said suit of Chetwood *vs.* The California National Bank of San Francisco *et al.* has at all times been H. D. Talcott, Esq., but that the bank did not appear on either of said appeals in the supreme court of the State of California nor was any petition for a rehearing ever filed on either of said appeals by said bank or by any one else in the name of the bank; that affiant has given to no one authority to represent said bank, but prior to the issuance of the writs of error herein caused his attorneys to notify the attorneys for said Chetwood that if any attempt was made by him or the officers of the bank or their attorneys to further delay the turning over of said fund to this complainant as the agent of said bank that it would be considered by him an open contempt of the United States circuit court and would be reported to said court for action.

Wherefore affiant asks that an order be made by this honorable court requiring the said John Chetwood, Jr., E. G. Knapp, A. W. Thompson, W. K. Vanderslice, and Charles H. Holt to be and appear before this court at a day and hour therein named and show cause, if any there be, why they should not be adjudged guilty of contempt of this court in using the name of the defendant bank in applying for the writs of error aforesaid and in falsely and willfully representing that the said E. G. Knapp and A. W. Thompson were the attorneys for this bank, and that the said John
25 Chetwood, Jr., was the representative stockholder of said bank.

T. K. STATELER.

Subscribed and sworn to before me this 6th day of November, 1896.

EUGENE W. LEVY,
[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

26 "EXHIBIT 3" (Continued).

"EXHIBIT A."

In the Supreme Court of the United States of America.

On error from the supreme court of the State of California.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO and JOHN Chetwood, Jr., Representative Stockholder Therein, Plaintiffs in Error,

vs.

T. K. STATELER (Agent), S. P. YOUNG (Receiver), (ROBERT A. Wilson, Richard R. Thompson) and Richard P. Thomas, Defendants in Error.

Petition for Writ of Error, with Assignments of Error.

To the Honorable W. H. Beatty, chief justice of the supreme court of the State of California:

Now come plaintiffs in error, the above-named corporation, The

California National Bank of San Francisco, and its representative stockholder, John Chetwood, Jr.

And respectfully show and represent that manifest error appears on the face of the record in this cause, and that plaintiffs in
27 error specially set up and claimed in said cause—

I.

That under sections 5132 to 5243 of the Revised Statutes of these United States the said banking corporation, one of the plaintiffs in error, was duly incorporated in the year A. D. 1886, and that it had a right thereunder to exist and to do business as a corporation and manage its affairs as such, by and through its board of directors and duly appointed officers, and that such right was put in issue in this cause and denied to said banking corporation, plaintiff in error, by said supreme court of the said State of California, whose decision therein was adverse to such claim and to such asserted right, and therein said court of said State erred.

II.

That the said corporation has never been dissolved nor its charter forfeited, but said supreme court of said State decided that it had been dissolved and its charter forfeited and therein erred.

III.

That plaintiffs in error also claimed and claim herein that the said laws of the United States gave and accord to the said corporation the right so to exist and transact business for twenty (20) years, unless sooner dissolved by a vote of the owners of two-thirds ($\frac{2}{3}$) of the stock of said bank, or unless its franchise is sooner declared forfeited by a decree of a United States court in a suit to be brought by the Comptroller of the Currency, and this asserted right
28 claimed by plaintiffs in error the supreme court of said State denied to said corporation and its said stockholders in this cause and therein erred.

IV.

That plaintiffs in error claimed therein that the statutes of the said United States should be interpreted to mean and that they did in fact and were intended to mean and intend that the clause providing for the appointment of an agent and his election by a majority of the holders and owners of stock of said corporation (national banks) and for the assignment to him by the said comptroller of all the assets of such and said bank, under which said statute the said T. K. Stateler has claimed to hold an appointment as such an agent of plaintiff in error, said bank, applies and should apply and be applicable to national banks which had theretofore been dissolved by such decree of a United States court or by such vote of two-thirds ($\frac{2}{3}$) of the stock thereof, and to no others.

That such interpretation is the only fair and reasonable interpretation and import of said statutes, and such interpretation

would leave and does leave to plaintiff in error, said bank, the right so claimed by its under said laws, to wit:

The right to exist as such corporation and manage its affairs and distribute or dispose of its assets as it sees fit through its board of directors and officers and agents nominated and appointed by it and them.

Which said interpretation and rights so claimed by these plaintiffs in error thereunder the said supreme court rejected and denied and therein erred.

29 V.

The plaintiffs in error respectfully represent and show further that the said action of the comptroller in making the said or any such assignment in this case and the decision of the said supreme court of said State, that such assignment did vest title and right to the assets of said banking corporation in said T. K. Stateler as such agent, in effect dissolved said corporation by and upon a bare majority vote of its stockholders, and thereby deprived said corporation. pl'ff in error, of its property & right of existence and franchise without due process of law, contrary to the law of the land, and denied it the equal protection of the laws.

VI.

Plaintiffs in error claimed herein that under said laws of the United States the stock that was fully paid up was the only stock that had any right to vote at such election, and that the holders of such stock so fully paid and upon which all the assessments were fully paid were the only parties entitled to vote, and that they as such had the exclusive right to vote and control the election of such agent, and that they had a right to exclude all stock upon which any assessments or assessment remained unpaid and delinquent from voting or being voted or represented at any such meeting or election, and particularly at the election at which said T. K. Stateler claims to have been elected such agent, which claim and rights said supreme court of said State denied and decided against the same and erred therein.

30 VII.

Plaintiffs in error claimed herein in said cause that at such stockholders' election or meeting they, said corporation and said stockholders, had the right to reject and refuse to consider or count the votes of parties claiming to have become holders of stock in said corporation since the suspension of said bank, to wit, since the appointment of a receiver therefor, and the right to reject votes of stockholders who had not paid in full the assessment levied by the comptroller; which said rights were each denied by the said supreme court of said State, whose decision was adverse thereto, and therein it erred.

VIII.

Said supreme court of said State erred in deciding and ordering and in adjudging and directing that said T. K. Stateler, as such agent or at all, is or was entitled to the custody of the funds paid into this court in this cause, or any part or portion thereof.

IX.

Said supreme court of said State erred also in not affirming the order of the trial court refusing to turn said sum of $27,500.00 or any part thereof over to said T. K. Stateler.

X.

Said supreme court of said State erred in deciding and adjudging that the litigation in this matter was or is at an end, and erred also in directing said money or any part of it paid to said State-
31 ler until the final determination of the said cause and of said litigation, since a writ of error hath been issued out and allowed by his honor Justice Field, of the Supreme Court of the United States, to review the judgment of said supreme court of said State reversing the judgment of said superior court in favor of pl'ffs and against said Thomas.

XI.

Said supreme court of said State also erred in not directing that the said fund paid into said superior court to the credit of this cause should be retained by said lower or trial court under its control, subject to the orders of its supreme and the United States Supreme Court, until final determination of the question of the liability of said Richard P. Thomas and the final settlement of the trust created by the payment of said money into court, which cannot be until the determination of the litigation between plaintiffs in error and said Richard P. Thomas regarding his liability upon the claims sued upon herein and the satisfaction of any judgment now against him or that may be recovered against him.

XII.

Said supreme court of said State erred also in not directing that an allowance be made to plaintiff for the payment of costs, fees, and expenses of prosecuting writs of error in the Supreme Court of the United States to review the decisions of the said courts of said State in releasing said R. P. Thomas from all liability on the judgment given against him at the trial.

32 XIII.

Said supreme court of said State also erred in not holding and deciding that the said superior court as a court of equity had full power and control over the funds paid in to the credit of this cause and so in the custody of said courts, and that it was the duty of said

State courts having thus taken jurisdiction of said matter in equity to retain the same and not to relinquish or renounce the same until a final determination of the litigation and final settlement of the said trust upon which said money was paid and received, and of all matters connected with said litigation and said trusts or affecting the same.

That said supreme court of said State erred in not holding and deciding that the said superior court having thus taken jurisdiction and control of said matters should continue to administer the same, and erred in deciding and ordering that said superior court should pay the said funds or any portion of them over to said Stateler, and erred in not directing said trial court to retain the custody of the funds till at and after the conclusion of said controversy between said corporation and its former president, R. P. Thomas; and erred in not deciding that the funds then remaining or that may be recovered should be then divided and distributed by the said superior court having control of said funds to the proper officers of the corporation duly elected or appointed or to its stockholders direct in the proportion in which each is entitled thereto, to the exclusion of defendants Thomas, Thompson, and Wilson; and erred
33 in not directing said superior court to accomplish this end by such appropriate orders and process and machinery as are within its power as such court of equity to employ, and the said courts of said State in declining to so retain said fund and in failing to exclude defendants from participation in said funds and in refusing to retain and administer upon said funds erred.

Wherefore plaintiffs in error pray that a writ of error issue to review said orders and decrees of said courts of the said State of California, and particularly that the judgment and order made herein August 7th, 1896, by the supreme court of said State, awarding and directing the said fund to be paid to said T. K. Stateler, and reversing the order of said superior court denying his application therefor, be reversed, and that the Supreme Court of the United States direct that the said funds be retained until the determination of said litigation, and thereupon and thereafter that the same be paid over directly to said corporation or to such stockholders as may be entitled to a dividend therein to the exclusion of said R. P. Thomas, defendant in error, and his codefendants, R. P. Thompson and Robert A. Wilson, defendants in error.

Dated Oct. —, 1896.

E. G. KNAPP,
Attorney for Plaintiffs in Error.

Writ granted October 22nd, 1896.

BEATTY, *C. J.*

Endorsed: "Filed Oct. 31, 1896."

34 "EXHIBIT 3" (Continued).

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Bank) and JOHN CHETWOOD, JR., Defendants.

On reading the annexed affidavit of Thomas K. Stateler, the complainant herein, and on motion of Pierson & Mitchell and Robert A. Friedrich, and good cause appearing therefor—

It is ordered that John Chetwood, Jr., E. G. Knapp, A. W. Thompson, W. K. Vanderslice, and Charles H. Holt be and appear before this court on Tuesday, the 10th day of November, 1896, at 11 o'clock a. m., then and there to show cause, if any there be, why they should not be adjudged guilty of contempt of this court for disobeying and refusing to obey the injunction heretofore issued by this court in this action and referred to in the annexed affidavit and for committing the acts complained of in said affidavit in violation of the jurisdiction of this court.

35 This order to show cause will be heard upon the annexed affidavit, upon the papers on file herein, and upon the records of this action in this court, and such other affidavits as may be proper and which may be introduced upon the hearing of this order to show cause.

Dated November 6th, 1896.

WM. W. MORROW, *Judge.*

Good cause appearing therefor—

It is ordered that the time of serving the foregoing order to show cause be, and the same is hereby, shortened to two (2) days.

Dated November 6th, 1896.

WM. W. MORROW, *Judge.*

36 "EXHIBIT 3" (Continued).

UNITED STATES OF AMERICA,
Northern District of California, } *ss.:*

A. W. Linforth, being first duly sworn, deposes and says that he is a citizen of the United States over and above the age of twenty-one years and not a party to the above-entitled action.

That heretofore, to wit, on the 6th day of November, A. D. 1896, at the city and county of San Francisco, State of California, he duly served the annexed order to show cause upon the parties therein named—John Chetwood, Jr., W. K. Vanderslice, E. G. Knapp, and A. W. Thompson—by then and there delivering to each of said parties a copy of said order to show cause, together with a copy of the affidavit hereto annexed and a copy of the order shortening time of service.

That upon inquiry at the place of business of Charles H. Holt

affiant was informed that he was absent from the State and was not expected to return for three weeks.

A. W. LINFORTH.

Subscribed and sworn to before me this 7th day of November, 1896.

EUGENE W. LEVY,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

37 "EXHIBIT 4."

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

Whereas by the verified bill of complaint herein it has been represented unto this court in this case on behalf of T. K. Stateler, the complainant herein, that he is the duly elected, qualified, and acting agent of the said defendant banking association under an act of Congress entitled "An act to amend an act entitled 'An act authorizing the appointment of receivers for national banks, and for other purposes,' approved June 30th, 1876, approved August 3rd, 1892," and that the said banking association and John Chetwood, Jr., defendants herein, are, without warrant of law, interfering with him in the discharge of the duties of his office, and have been and now are premeditating useless and vexatious litigation ostensibly for said association, but in truth against its interests and in the interest of defendant Chetwood, and that they now threaten to commence further suits to hinder and delay him in the perform-

38 ance of the duties of his office, and have contracted and threaten to further contract claims which, they assert, are legal and valid claims against the funds of said banking association now in the hands of the complainant as its agent, or that may hereafter come into his hands as its agent, and that such claims are liable to exhaust the funds of said bank and create irreparable injury, and that the said banking association has been duly adjudged insolvent by the Comptroller of the Currency of the United States, and that the said defendant, Chetwood, is insolvent and unable to respond to any judgment the complainant may hereafter, as the agent of said bank, recover against him for damages already accrued to said bank through his conduct;

And whereas in the prayer of said bill of complaint the complainant has asked for an order upon the said defendants to appear and show cause why they should not be enjoined, pending the determination of this action, from the commission of the acts complained of in said bill, and, at the same time, has asked that they be re-

strained from the further commission of said acts until the determination of said order to show cause:

Now, therefore, good cause being shown to the satisfaction of this court, it is ordered that the defendant The California National Bank of San Francisco and the defendant John Chetwood, Jr., be and appear before this court, at its court-room, in the city and county of San Francisco, on Tuesday, the fourteenth day of January, A. D. 1896, at 11 a. m., then and there to show cause, if any they have, why the said bank, its board of directors, officers, and employees, and the said John Chet-
39 wood, Jr., his agents and servants, and each and every of their said attorneys, solicitors, and counsellors, should not be restrained and enjoined, pending the determination of this action, from denying the rights of the complainant to the said office of agent of said banking association, and from denying his right as such agent to the exclusive control of the assets of said bank, and from commencing any further litigation against him as such agent, and from prosecuting and defending any actions heretofore brought by them or either of them against complainant, as such agent, touching his right to said office and touching his exclusive right as such agent to collect the assets of said bank, except the suit now pending in this court, brought by said defendants as aforesaid against the complainant on the 12th day of November, 1895, and which suit the complainant in his bill herein especially exempts from the operation of any injunction that may hereafter be granted herein, and why said bank, its board of directors, officers, and employees, and the said Chetwood, his agents and servants, and each and every their said attorneys, solicitors, and counsellors should not be restrained and enjoined, pending the determination of this action, from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by an open account, note, bill, or judgment, and particularly from attempting in any manner to collect the judgment heretofore recovered for said bank against the said Richard P. Thomas and referred to at length in said complaint, and from further prosecuting the suit brought by them in the superior court of Alameda county to place a receiver in charge of the Standard Soap Company, as set forth at length in said bill of complaint,
40 and, in the meantime and pending the hearing and determination of said order to show cause, the said defendant, The California National Bank of San Francisco, its directors, officers, and employees, and the said defendant, John Chetwood, Jr., his agents and servants, and each and every their said attorneys, solicitors, and counsellors, be, and they are hereby, restrained and enjoined from denying the rights of the complainant to the said office of agent of said defendant bank, and from denying his right as such to the exclusive control of the assets of said bank, and from commencing any further litigation against him as such agent, and from prosecuting or defending any actions heretofore brought by them or either of them against the complainant, as such agent, touching his right to said office and touching his exclusive right as

such agent to collect the assets of said bank, except the suit now pending in this court, brought by them as aforesaid against this complainant on the 12th day of November, 1895, and which suit is hereby especially exempted from the operation of this restraining order and order to show cause, and the said bank, its board of directors, officers, and employees, and the said defendant, Chetwood, his servants and agents, and each and every their said attorneys, solicitors, and counsellors, be, and they hereby are, restrained and enjoined, pending the hearing and determination of said order to show cause, from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by an open account, bill, note, or judgment, and particularly from attempting in any manner to collect the judgment heretofore recovered for the said bank against the said Richard P. Thomas
41 and hereinbefore referred to, and from further prosecuting the suit brought by them in the superior court of Alameda county to place a receiver in charge of the Standard Soap Company, hereinbefore referred to.

It is further ordered that this order to show cause be heard upon the verified bill of complaint herein and upon such affidavits as may be produced by the defendants or either of them and such counter-affidavits as may be produced by the complainant upon the hearing of said order to show cause, and that with this order there be served upon each of said defendants a copy of said bill of complaint.

WM. W. MORROW, *Judge.*

Dated January 4th, 1896.

42 "EXHIBIT 5."

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

To the honorable the judges of the circuit court of the United States, ninth circuit, in and for the northern district of California:

Thomas K. Stateler, a citizen and resident of the State of California, files as of course his amended bill of complaint herein against The California National Bank of San Francisco, a national bank having its principal place of business at the city and county of San Francisco, State of California, and John Chetwood, Jr., a citizen and resident of said State of California; and thereupon your orator avers and shows:

43 I.

That in the year 1886 the California National Bank of San Francisco was formed for the purpose of carrying on the business of banking at the city and county of San Francisco, State of California, under title LXII of the Revised Statutes of the United States and the acts of Congress amendatory thereof and supplemental thereto, with a capital stock of two hundred thousand dollars, divided into two thousand shares of the par value of one hundred dollars per share, and all of which said capital stock was subscribed for and fully paid up prior to the commencement of business by said bank, and that said bank did commence business as a national banking association at said city and county of San Francisco, in said year, and did continue in business as such at said place until the 15th day of December, 1888, when said defendant bank, being unable to meet its obligations, suspended business and closed its doors. On January 14th, 1889, the Comptroller of the Currency of the United States, having completed a preliminary investigation of the condition of the bank, through the bank examiners, and having become satisfied of the insolvency of the bank, declared the corporation insolvent under section I of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30th, 1876, and appointed a receiver to take charge of its affairs. Such receiver at once qualified and entered upon the duties of his office and was in office until as hereinafter set forth. On the 6th day of July, 1894, the Comptroller of the Currency
44 having paid to each and every creditor of the bank, not including such shareholders as may have been creditors of the association and whose claim or claims as such creditor had been proved or allowed as prescribed in section 5236 of the Revised Statutes of the United States, and the full amount of such claims and all expenses of the receivership and the redemption of the circulating notes of such bank having been provided for by depositing sufficient lawful money of the United States with the Treasurer of the United States at Washington, a meeting of the shareholders of said bank was duly held pursuant to notice thereof given by the Comptroller of the Currency of the United States for thirty days in a newspaper printed and published in the city and county of San Francisco, State of California, the place where the business of said bank had been carried on, and which meeting was called for the purpose of having the shareholders determine whether the receiver should be continued and wind up the affairs of the said association or whether an agent should be elected for that purpose pursuant to the provisions of an act entitled "An act to amend an act entitled 'An act authorizing the appointment of receivers of national banks, and for other purposes,' approved June 30th, 1876, approved August 3rd, 1892." At said meeting so as aforesaid duly held pursuant to said notice for the purpose hereinbefore recited 1,020 out of the 2,000 shares constituting the entire capital stock of said banking association *was* represented and voted, and the said

1,020 shares, being a majority of the capital stock of said banking association, *was* voted, as required by said act, in
45 favor of electing an agent to succeed the receiver. Thereafter said 1,020 shares of stock, being a majority of the total capital stock of said banking association, *was* voted in favor of the complainant as agent, and the complainant was thereupon elected agent of said bank for the purposes set forth in the statute last above referred to and in accordance with the requirements of said section, all of which will more fully appear by reference to a copy of the minutes of said meeting, hereto attached, marked Exhibit "A," and hereby made a part of this bill; that the original period for which the defendant bank was incorporated and organized has not expired, and none of the parties who voted for the agent at said meeting and whose names are set forth in the minutes referred to are liable for or owed unpaid subscriptions to their stock.

II.

Your orator further shows that after his said election certain shareholders of said defendant bank executed and filed a bond, to the satisfaction of the Comptroller of the Currency of the United States, with said comptroller, conditioned for the payment and discharge in full of each and every claim that might thereafter be proved and allowed by and before a competent court and for the faithful performance of all and singular the duties of his trust as agent, and that thereafter said bond was approved by the said comptroller, and that thereafter and on the 26th day of February, 1895, said comptroller and said receiver executed to your orator an assignment and transfer in writing, in the words and figures as follows, to wit:

46 "Know all men by these presents that whereas a meeting of the shareholders of the California National Bank of San Francisco, California, called by the Comptroller of the Currency after giving due notice thereof, as required by law, was held on the 6th day of July, 1894, for the purpose of electing an agent for the bank, as provided by section 3 of the act of June 30th, 1876;

And whereas at such meeting T. K. Stateler was duly elected such agent and the required bond has been executed and filed by the shareholders to the satisfaction of the comptroller, conditioned, as required by law, for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against said banking association and for the faithful performance and discharge of all and singular the duties of his trust:

Now, therefore, I, James H. Eckels, Comptroller of the Currency, and I, S. P. Young, receiver of the bank, do hereby transfer and deliver to T. K. Stateler, the agent aforesaid of the said banking association, all and singular the undivided or uncollected or other assets and property of said association now in our hands or subject to our

order and control or in the possession or subject to the order and control of either of us for the purposes contemplated by said act.

Executed in triplicate.

Washington, D. C., Feb'y 26th, 1895.

JAMES H. ECKELS,
Comptroller of the Currency.

San Francisco, Cal., Feb'y 1st, 1895.

S. P. YOUNG,
Receiver of 'the California National Bank of San Francisco, Cal.'"

47 III.

That said assignment was received by your orator early in March, 1895, and that upon receiving such assignment your orator became the duly elected, qualified, and acting agent under the act of Congress above recited, and became entitled to hold, control, and dispose of the assets and property of said banking association and the whole thereof for the benefit of the shareholders of such association, and became entitled in his own name or in the name of said banking association to sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and became authorized to sell, compromise, or compound the debts due to such banking association, with the consent and approval of the circuit or district court of the United States for the ninth circuit and northern district of California, being the district where the business of such banking association had been carried on, and it became his duty at the conclusion of his trust to render to said district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court upon due notice was to settle and adjust such accounts and discharge your orator as such agent and the sureties upon his said bond; and it further became the duty of your orator as such agent to distribute the proceeds of the assets or property of said banking association which should be undistributed at the time he was elected such agent or which he might subsequently receive, firstly, to pay the expenses of the execution of the trust to the date of payment; and,

48 secondly, to divide the balance ratably among the stockholders of said defendant banking association in proportion to the number of shares held and owned by each, such distribution to be made from time to time as the proceeds should be received by him and as should be deemed advisable by the Comptroller of the Currency of the United States or said agent.

IV.

That the said Comptroller of the Currency of the United States and his said receiver have turned over to your orator as agent under said act all the funds and property of said bank in their possession or under their control, consisting of moneys in bank and certain bank furniture and certain choses in action and evidences of indebtedness due said banking association, and have given him sub-

stitutions as plaintiff in such litigation as was then pending in the various courts brought by the receiver under the advice and direction of said comptroller to collect the assets of said national banking association, as far as it was in the power of the said comptroller or said receiver to substitute your orator.

V.

That at the time the bank so as aforesaid suspended payment, and at the time the Comptroller of the Currency declared it to be insolvent, and at the time he appointed a receiver to take charge thereof, its board consisted of seven members, to wit, R. P. Thomas, its president; R. A. Wilson, its vice-president, and R. R.
49 Thompson, George E. Whitney, William K. Vanderslice, Charles H. Holt, and B. Noyes, and that the books of said banking association showed that on the 5th day of January, 1889, after the bank had closed its doors, but before a receiver was appointed, the said Richard P. Thomas owned 960 shares of the capital stock, the said R. R. Thompson owned 555 shares, and the said R. A. Wilson owned 70 shares, making a total of 1,585 shares of stock held by said three directors, the full value of which had been paid into said bank, amounting to $158,500.00; that the balance of said capital stock was scattered among small holders thereof.

VI.

That on the 19th day of July, 1890, and while said receiver was in office, the defendant John Chetwood, Jr., holding twenty shares of the capital stock of said banking association and no more, commenced a suit in the superior court of the city and county of San Francisco, State of California, entitled "John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco (a corporation), Richard P. Thomas, Robert R. Thompson, Robert A. Wilson, and S. P. Young, receiver of said bank, defendants." Said action was brought by the said defendant, Chetwood, as a stockholder of said corporation, for the benefit of the corporation, to recover from the defendants Thomas, Thompson, and Wilson, as the executive committee of the board of directors of the bank, the sum of four hundred thousand dollars as damages for negligence, being the amount claimed by the plaintiff to have been lost to the bank by reason of unfortunate investments
50 made by the cashier and which losses the defendant Chetwood claimed would not have occurred if the said three defendants in that action had properly supervised the acts of the cashier, a supervision alleged in the complaint filed in said action to have been imposed upon the said three defendants as members of said executive committee by the by-laws of the corporation, and made the corporation and the receiver parties defendant. All the defendants appeared in the action. No other stockholders intervened, and such proceedings were thereafter had that on the 27th day of April, 1894, the case having been tried, the court in which said action was pending rendered its decision holding that the

plaintiff therein was entitled to a judgment in his favor for the benefit of the corporation as against the defendants Thomas, Thompson, and Wilson for an amount equal to the actual loss to the bank resulting from the bad investments made by the cashier, the court finding that no fraud had been committed by said three defendants, and that none of them were guilty of any misconduct in any way connected with the matter, and referred the matter to a referee to ascertain the amount of the bad loans made by the cashier. The report of the referee was filed in said court on the 17th day of August, 1894. It reported the loss that accrued to the bank through the bad loans made by the cashier amounted to the sum of one hundred and ninety-seven thousand ninety-two and $\frac{91}{100}$ dollars, for which amount, under the decision of the court above referred to, it became the duty of the court to enter a judgment against the three individual defendants on motion of the plaintiff in
51 said action, to wit, the defendant here, John Chetwood, Jr. No such motion was ever made, but on the 24th day of September, 1894, stipulations were filed in said action whereby the complainant therein renounced and withdrew his cause of action against the defendants Thompson and Wilson and directed that a judgment of dismissal be entered accordingly, and on the same day the said superior court ordered the action dismissed as against said two defendants in pursuance of said stipulations and directed that a judgment of dismissal be entered accordingly, and said judgment of dismissal was accordingly on said date entered against the defendants Thompson and Wilson by consent of the plaintiff therein. A part of the consideration for such dismissal was the payment by the said Thompson and Wilson into said superior court of the sum of $27,500.00, and, as your orator has been informed and believes, and upon such information and belief avers, the deposit in the Bank of California, at San Francisco, of their holdings of the capital stock of the defendant bank, to wit, 625 shares, and the execution of a written agreement between them and the defendant John Chetwood, Jr., to the effect that said stock should not share in any dividend that might thereafter be declared out of said sum of twenty-seven thousand five hundred dollars nor in any dividend that might thereafter be declared out of the first ten thousand dollars that might be collected on account of any judgment that might thereafter in said action be recovered against the defendant Thomas. At the time said action was dismissed against the defendants Thompson and Wilson both of them were and ever
52 since have been men of large fortune and means, and the defendant Thompson at that time was and ever since has been a man worth in property situate in the State of California and not exempt from execution, standing in his own name, over one million five hundred thousand dollars, and that at the time said action was dismissed as to the defendants Thompson and Wilson as aforesaid the defendant Chetwood well knew that the said defendants, Thompson and Wilson, were men of large means, and that the judgment for $197,092.91 which had to be entered in said action on his motion in accordance with the previous decision of the court could

be collected from the defendant Thompson alone; and your orator avers that at the time said action was dismissed as to said defendants, Thompson and Wilson, the said John Chetwood, Jr., well knew that any judgment collected against the other defendant in said action, to wit, the said Richard P. Thomas, would be of doubtful value, as he was a man of doubtful means and had no property standing of record in his name. Your orator further avers in this connection that the action above referred to was against three tort-feasors for damages for negligence, although brought in the shape of an action in equity for an accounting; and, as your orator is informed and believes, and upon such information and belief avers, that notwithstanding this fact the said John Chetwood, Jr., assuming to act for said corporation, without the knowledge or consent of any of its stockholders other than himself, released two of said three tort-feasors for the consideration above set forth; that

53 after the dismissal of said action as against the said defendants, Thompson and Wilson, and on the 10th day of October, 1894, the said Chetwood appeared in said superior court in said action and obtained an order from said court awarding him out of said fund the sum of $560.16 for expenses claimed to have been incurred by him in prosecuting said action, and the sum of $9,000.00 for attorneys' fees claimed to have been incurred by him for prosecuting said action; that no notice of said application was ever given to the attorneys in the case other than the attorney for the said Richard P. Thomas, who appeared and opposed the motion; that no notice was ever given to the receiver of this bank or to any officer of the bank or to the Comptroller of the Currency that such an application would be made, and the first mention in the records of said case in said superior court of the fact that Thompson and Wilson had ever paid any money to have said action dismissed against them was made in the order allowing the defendant Chetwood over one-third of the fund for his attorneys' fees and costs; and your orator avers that the said defendant, Chetwood, made said settlement with the defendants Thompson and Wilson without consultation with the Comptroller of the Currency or the receiver of the bank or any of the officers or directors of said bank; and your orator is informed and believes, and upon such information and belief avers the fact to be, that the said defendant, Chetwood, purposely kept the fact of the payment of the $27,500.00 secret from the corporation and from the receiver in charge of the affairs of said corporation and from the Comptroller of the Currency

54 of the United States until he could apply to and obtain an order from the said superior court awarding him over one-third of said trust fund, as above set forth, in repayment of the alleged personal expenses and attorneys' fees incurred by him in the prosecution of the suit, to the end that the corporation and the receiver and the Comptroller of the Currency might not appear upon said application and oppose said motion, and the said defendant, Chetwood, further applied for and obtained said orders and received said moneys from the said trust fund and has expended the same, notwithstanding the fact that the bank was in the hands of a

receiver appointed by the Comptroller of the Currency of the United States, as aforesaid, whose duty it was to receive all moneys belonging to the bank and appropriate the same to the payment of the debts of the corporation, or, if the debts had been paid, to hold the same until the agent elected by the shareholders of said banking association as aforesaid on the 6th day of July, 1894, should receive his commission from the Comptroller of the Currency and be authorized to have and receive the moneys for the use of the bank.

VIII.

That on the 20th day of November, 1894, findings were filed in said superior court in said above-mentioned action, in which it was expressly found that the amount of the actual loss to the corporation through the negligence of said three defendants was the sum of $166,919.00 instead of $197,092.91; that $27,500 had been paid thereon by Thompson and Wilson as aforesaid; that the net loss to the bank was $139,419.00, for which amount the court ordered
55 a judgment to be entered against the third tort-feasor, to wit, the defendant therein, Richard P. Thomas; that such judgment was entered against the defendant Thomas on said last-named date, and that he thereafter appealed from said judgment, and that said appeal is now pending in the supreme court; and your orator is informed and believes that, owing to the conduct of the said John Chetwood, Jr., in releasing the said Thompson and Wilson from the claim of the bank against them, serious and grave questions have arisen as to the validity of the said judgment, the said Thomas claiming that the release of the said defendants, Thompson and Wilson, released him, which questions are involved in said appeal; that thereafter and on the 4th day of January, 1895, the said John Chetwood, Jr., again appeared in said superior court and made an *ex parte* application without any notice to the bank or to the receiver or to the Comptroller of the Currency of the United States or to your orator, who the said John Chetwood, Jr., knew had been elected agent, but had not at that time received his commission from the comptroller, and obtained a further order that $1,000.00 of said trust fund be placed at his disposal, he having stated in the affidavit in support of said application that the said Richard P. Thomas, the judgment debtor, had gone into insolvency, that he believed that Thomas had property which he had not turned over to his assignee, and that it would require the employment of detectives to find the property; and your orator avers that at the time of the making of this *ex parte* application and *ex parte* order what remained of the fund was on deposit in the Bank of California
56 and could only be paid upon order of the superior court. The bank book was in the possession of the said John Chetwood, Jr., who upon the making of the order at once proceeded to the bank and drew out the said one thousand dollars, but that he has never filed any account of the expenditures of said fund with said superior court or any other court or has ever rendered any account thereof to the receiver or to your orator as agent of said

bank; that this was before your orator had received his commission from Washington, as above set forth; that more than sixty days, the time within which an appeal from an order made after final judgment can be taken under the laws of the State of California, elapsed before your orator had received his commission and had been advised of the condition of affairs, and he was therefore unable to appeal from that order allowing the said Chetwood the said sum of one thousand dollars, and he has been unable to appeal from the order of October 10th, 1894, allowing the said Chetwood the sum of $9,560.16, as above set forth, for the reason that, as he is informed and believes, and upon such information and belief avers, such order is not an appealable order under the laws of the State of California, and for the further reason that he is not a party to said action and has not been recognized as such, as hereinafter fully appears. In this connection your orator avers that he is informed and believes, and upon such information and belief alleges, that the said $27,500 so as aforesaid paid into said superior court by the defendants Thompson and Wilson was the property of said
57 defendant banking association and should have been turned over to your orator as soon as he qualified as agent and made a formal demand for the same, and that said superior court did not have the jurisdiction to make any order to pay said moneys or any portion thereof to any other person than the receiver of said bank or the agent thereof, because the judgment of dismissal against the said defendants, Thompson and Wilson, under which said money was paid, did not authorize the payment of any counsel fees or expenses in said action to the said Chetwood or any one else, and that the said judgment so as aforesaid recovered by the said Chetwood for the benefit of said bank against the defendant Richard P. Thomas specially set forth that said judgment was for the benefit of said bank and did not authorize the payment of any moneys collected on account of the debt due said bank in the payment of attorneys' fees or expenses, and for the further reason that, under the act of Congress last above referred to, pending the receivership all claims against an insolvent national bank shall be proved and allowed as provided by title LXII of the Revised Statutes of the United States, and no claim can be allowed against the bank except in the manner therein provided, and any claim for expenses connected with collecting the assets of said bank must be passed upon by the United States circuit or district court for the district in which said bank was doing business prior to its insolvency, and your orator therefore, acting in behalf of the shareholders of said banking association, has applied to the supreme court of the State of California for an order reviewing the orders so as aforesaid made by the superior court
58 allowing said sums to the said Chetwood, and that said application is now pending before the supreme court and is undetermined; and your orator in this connection further avers that, no matter which way said application for the writ of certiorari is decided by the supreme court, there still exists and will exist, as he is informed and believes, and upon such information and belief avers, a valid and legal claim in favor of the defendant banking

association and against the said John Chetwood, Jr., for the sums so appropriated by him under the orders so as aforesaid set forth, with interest thereon from the date of said appropriation, and that it will be necessary for your orator, as the agent of said defendant banking association, as aforesaid, to commence an action to recover from the said John Chetwood, Jr., said sums above specified, with interest thereon as above specified, to the end that the affairs of said defendant association be properly wound up, its assets converted into money, and its money distributed among its stockholders as provided by law.

VIII.

That on the 10th day of December, 1894, and after the entry in said superior court of the judgment against him in the action referred to, the said Richard P. Thomas filed in the superior court of the county of Alameda, State of California, a petition in insolvency, and under what is known as the California insolvency law of 1880, and by means of said insolvency proceedings sought to obtain a discharge from his debts, including a discharge from the judgment so as aforesaid rendered against him in said action; that on
59 or about the 28th day of January, 1895, your orator learned that the said John Chetwood, Jr., had caused to be filed in the said insolvency proceeding in the said superior court a certified copy of the judgment as aforesaid recovered by him against Thomas for the benefit of said bank, and had caused himself to be elected assignee under said act in said insolvency proceeding and claimed and asserted that he was entitled to control said judgment and to collect the same as against your orator, so as aforesaid duly elected agent by the shareholders of said bank; that your orator thereupon appeared in said superior court and claimed that, as he was the agent of the bank, he had the right to control the judgment. At that time your orator, as agent, had not been accepted by the Comptroller of the Currency, and for that reason your orator had not qualified as agent and his commission had not reached him, and the superior court of Alameda county refused to recognize him as such.

IX.

That among the assets of said banking association turned over to your orator by its receiver was a promissory note, dated San Francisco, May 14, 1888, payable one day after date to one C. H. Ramsden, for the sum of $2,431.85, with interest thereon, at the rate of nine per cent. per annum, until paid, signed by H. R. Houghton, Isaac Trumbo, and the above-named Richard P. Thomas, and which said promissory note had been prior to the failure of the bank endorsed by the payee to the bank, and thereupon and thereby became the property of the bank,
60 and upon which a suit had been instituted by the receiver in the superior court of the city and county of San Francisco on the 25th day of September, 1891, against the three makers to recover the balance due thereon, to wit, $1,885, with interest, at the rate of nine per cent. per annum, from the date of fil-

ing the complaint. On the 15th day of March, 1895, your orator was by an order of the superior court, in which said action was then and is now pending, duly substituted as plaintiff in said action in place of the receiver, and which said action is numbered 43315 on the files of said superior court and was originally entitled "S. P. Young, receiver of the California National Bank of San Francisco, plaintiff, *vs.* H. R. Houghton, Isaac Trumbo, and R. P. Thomas, defendants," and that thereafter and on the 18th day of March, 1895, your orator caused to be filed in said insolvency proceeding in the superior court of Alameda county the proof of said claim against the said Richard P. Thomas, and thereupon, believing that it was to the best interest of said banking association that the said Richard P. Thomas should not be allowed to take the benefit of said insolvency laws and obtain a discharge from said judgment, caused inquiries to be made as to the jurisdiction of the superior court of Alameda county in the matter of said insolvency proceedings and was informed and advised by his counsel employed to make such investigation that it was doubtful if the superior court had any jurisdiction of the insolvency proceedings; and your orator, for the purpose of setting aside said proceedings, if the same could be legally accomplished, did on the 18th day of March, 1895,
61 appeal from the order of the superior court of said county of Alameda made and entered on said 10th day of December, 1894, adjudging said R. P. Thomas insolvent and staying all proceedings against him, and said appeal is now pending before the supreme court of the State of California; that the said Chetwood has appeared in said supreme court in the matter of said appeal and has filed a brief therein asserting that the superior court of said county of Alameda did have jurisdiction to adjudicate the said Richard P. Thomas insolvent, and by every means in his power is trying to establish the legality of said insolvency proceedings, the result of which will be that if the legality of said insolvency proceedings *are* affirmed by said supreme court in said matter the said Richard P. Thomas will, if he complies with the provisions of the said insolvent act of 1880, be at once entitled to obtain his discharge from the judgment so, as aforesaid, recovered against him, and the largest asset of said corporation will be thus wiped out and destroyed; that in said appeal in said supreme court in said insolvency proceeding the said Richard P. Thomas has appeared and filed a brief in support of the position taken by the said defendant, Chetwood, and the interests of the said Chetwood and the said Thomas in said supreme court on said appeal are identical.

X.

On the 19th day of March, 1895, the said T. K. Stateler, having qualified as agent and received his commission from the comptroller, appeared before the superior court of the city and county of
62 San Francisco, in department 3 thereof, in the action above referred to of John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, and filed an

affidavit therein reciting, among other things, that he was the duly elected, qualified, and acting agent of the said bank; that there still remains of the fund paid into said court in said action by the said Thompson and Wilson some sixteen thousand five hundred dollars, and asked for an order for the plaintiff therein, the defendant Chetwood, to show cause at a day and hour in said order named why an order should not be made directing the balance of said fund to be turned over to your orator as the agent of said bank, so that it might be distributed among the shareholders of the bank as provided by law; that said order was made returnable on the 29th day of March, 1895; that on the 28th day of March, 1895, the said John Chetwood, Jr., appeared in said proceeding and opposed said application and filed his affidavit in which he took the ground that, as the judgment against Thomas had, as aforesaid, been rendered in his favor for the benefit of the corporation, he was entitled to control the trust fund paid in by Thompson and Wilson, and to use and expend it as he thought fit in opposing the appeal of your orator from the order adjudicating the said Thomas insolvent in the supreme court and in commencing such suits as he might deem proper to restrain the said Stateler from interfering with him in his absolute power and control over said judgment and over said trust fund. On the return day of said order to show cause, the 29th day of March, the said Chetwood appeared and filed another
63 affidavit, which necessitated another continuance until April 12th, and that on that day, on motion of the said Chetwood, the matter was again continued until April 19th, when the hearing was commenced and was continued until April 24th. On April 23rd the said Chetwood filed another affidavit in opposition to said order to show cause, and your orator filed and served an affidavit in rebuttal. On the 24th day of April the hearing of said order to show cause was resumed and continued until May 1st. On the 29th day of March the said Chetwood filed two additional affidavits opposing said motion. On May 1st the hearing of the order to show cause was resumed, and the plaintiff was permitted to file and serve another affidavit; that counsel for your orator moved to strike the affidavits from the files, but said motion was overruled, and that the further hearing was continued until May 2nd, as the new matter set up in the said Chetwood's numerous affidavits had to be met by another affidavit from your orator; that the oral hearing of the order to show cause was finished on May 2nd, and the matter was submitted on briefs; that on May 13th your orator served his brief, on May 23rd the said Chetwood served his reply brief, and that on May 31st your orator served his closing brief, and the matter was submitted. On the 8th day of July, 1895, the superior court of said city and county, before whom said order to show cause was heard, entered a minute order denying your orator's motion and discharging said order to show cause, and that said minute order was unaccompanied by any opinion, and that no grounds were given by the court for making said order; that from said order your orator appealed
64 to the supreme court of the State of California, and that the

transcript on appeal was filed in said superior court on the 29th day of September, 1895; that the opening brief on behalf of your orator in support of said appeal was filed and served on the 11th day of October, 1895; that on November 6th the supreme court made an order, at the request of the said John Chetwood, Jr., extending his time to file his reply brief until the 2nd day of December, 1895, and that the points and authorities on behalf of the said Chetwood, who was the respondent in said appeal, were not served or filed until the 30th day of November, 1895, and not then until various other means had been resorted to by the said Chetwood to delay the hearing of this appeal, as hereinafter more specially set forth.

XI.

That on the 30th day of March, 1895, the said Chetwood filed in the superior court of the county of Alameda, in the insolvency proceedings of the said Richard P. Thomas, an affidavit petitioning for a modification of the order of December 10th, 1894, adjudging the said Richard P. Thomas insolvent, notwithstanding the fact that an appeal was pending from said order in the supreme court so as aforesaid taken by your orator, reciting in said affidavit that he had discovered some real estate which belonged to Richard P. Thomas which was of the value of $40,000 and which was subject to a homestead claim, and that in the opinion of the said Chetwood the only way in which the property could be realized upon would be
65 for the superior court having jurisdiction of the insolvency proceedings to make an order authorizing the said Chetwood to procure an execution out of the superior court of the city and county of San Francisco upon the judgment so as aforesaid recovered by him for the benefit of the bank against the said insolvent, and permitting said execution to be levied upon the property in question, and in this way to subject the property over and above the amount of said homestead to sale, and that upon the presentation of this petition, without any notice having been given to any of the attorneys representing the other creditors in said insolvency proceeding, the judge of said superior court, at chambers, made an order authorizing the said Chetwood to have an execution issued upon the judgment so as aforesaid recovered by him for the benefit of said bank, and levy it upon the property claimed by the said Chetwood to belong to the said insolvent. Your orator did not learn of this action of the said Chetwood until about the 8th day of April, 1895, whereupon your orator filed, on the 9th day of April, an affidavit in the supreme court of the State of California calling the attention of the court to the making of said order, and in which said affidavit your orator stated that, if the said Chetwood was allowed to proceed under said order and subject any property of the insolvent that he claimed to have found to an execution issued upon the judgment referred to, the effect would be to allow the said Chetwood to collect the assets of the insolvent upon a judgment recovered before the adjudication of insolvency, and to apply the proceeds in

settlement of said judgment to the exclusion of the other
66 creditors of said insolvent, and that your orator had reason to believe that it was the intention of the said Chetwood to collect the judgment or to compound or compromise the same and to appropriate the proceeds thereof, not for the benefit of the said bank or the creditors of said insolvent, but to his own individual use and benefit; that on the 10th day of April, 1895, the supreme court made its order to show cause why a writ of certiorari should not issue therein, returnable on the 29th day of April, on which said last-named date the said Chetwood appeared, by his counsel, and defended the action of the said superior court in making said order, and thereupon claimed before said court that your orator was not the duly elected, qualified, or acting agent of said bank; that even if he was such agent he was acting in collusion with the said Richard P. Thomas, and that the question as to whether or not your orator was the duly elected, qualified, and acting agent of the defendant banking association and as to whether or not your orator was acting in collusion with the said Richard P. Thomas was directly in issue before said supreme court in said proceeding, and which said proceeding in said supreme court was entitled "T. K. Stateler, petitioner, *vs.* The Superior Court of Alameda County and Hon. A. L. Frick, judge thereof, respondents," and known as No. L. A. 35 on the files of said supreme court; and thereafter and on the 27th day of June the said supreme court of the State of California made its order annulling the order of the superior court of March 20th aforesaid, directing that said execution be with-
67 drawn and that all further proceedings in the matter of said insolvency be stayed until the determination of the question whether the superior court had jurisdiction to adjudicate the said Richard P. Thomas an insolvent under the laws of the State of California; and thereupon said supreme court duly made and entered its judgment in said proceeding, wherein and whereby all the matters so before it were duly passed upon, and wherein and whereby it was necessarily determined by said supreme court that your orator was the duly elected, qualified, and acting agent of the defendant banking association, and that your orator was not and never had been acting in collusion with the said Richard P. Thomas; that thereafter and on the 29th day of July, 1895, the supreme court denied the petition of the said Chetwood for a rehearing of the said matter, and the said judgment so as aforesaid given, made, and entered by the supreme court in said last-named proceeding has never been set aside, but the same is now of full force and effect.

XII.

That at the time your orator received his commission as agent there was on deposit in the Bank of California the sum of $16,639.84 as a balance of the sum of $27,500 so as aforesaid paid into said superior court of the city and county of San Francisco by the said Thompson and Wilson, and which said money was drawing no interest, and that the deposit book therefor was in the possession of

the said Chetwood, who claimed to have the right to use said moneys as he might see fit, under orders of the superior court of said city and county of San Francisco; that your orator be-
68 lieved it would be to the best interests of the shareholders of this bank that no further moneys should be expended by the said Chetwood out of said fund, and that pending the final decision by the supreme court of the question as to who was entitled to receive this money the fund should be placed where it would draw interest; and thereafter and on the 27th day of August, 1895, your orator appeared in said superior court of the city and county of San Francisco, in said case of Chetwood *vs.* The California National Bank of San Francisco *et al.*, and served an affidavit and notice, returnable August 31st, to the effect that he would move said superior court for an order designating a depository for the moneys to the credit of this action pending his said appeal from the order of the said superior court refusing to turn the same over to him as such agent and where said money might draw interest. Said motion was thereafter continued until the 3rd day of September, when an order was made directing that the moneys on deposit in the Bank of California be placed as follows: In the Hibernia Savings and Loan Society the sum of $4,000, in the San Francisco Savings Union the sum of $7,639.84, and in the German Savings and Loan Society the sum of $5,000, aggregating the sum of $16,639.84, being the entire balance of said trust fund; that the accounts in each of said banks were opened in the name of "the superior court of the city and county of San Francisco, department 3, in the case of John Chetwood, Jr., *vs.* The California National Bank of San Francisco *et al.*," and that the order directing this money to be deposited
69 in said savings bank directs that no portion of said money shall be drawn, except upon order of the court and after determination of your orator's appeal from the order of the superior court of July 8th, 1895. The pass books were delivered to the clerk of said superior court on the 18th day of September and are now retained by him in his custody until the determination of said appeal.

XIII.

Your orator further avers that the said Chetwood, on the 11th day of April, 1895, commenced an action in the superior court of the county of Alameda, State of California, entitled "John Chetwood, Jr., assignee in insolvency of Richard P. Thomas, an insolvent debtor, plaintiff, *vs.* The California National Bank of San Francisco, a corporation, your orator, and D. E. Dowling, defendants," claiming that as assignee in insolvency he was entitled to have and receive in his custody the 1,020 shares of stock of the defendant bank which he alleged in his said complaint belonged to the said Richard P. Thomas; that no summons has ever been served in said action upon your orator, and your orator is informed and believes, and upon such information and belief avers, that no summons has ever been served in said action upon either of the parties to said suit.

XIV.

Your orator further avers that ever since his election as agent of said bank as aforesaid he has been impeded and harassed and embarrassed in the discharge of the duties of his office by said Chetwood; that the said Chetwood is a man of no means, is insolvent, and
70 unable to respond to any judgment that the corporation or that your orator, acting for said shareholders, might recover against him for damages, and that the suit originally brought by him as a stockholder of said bank, while instituted by him apparently for the benefit of the corporation, was, as a matter of fact, instituted and is now being maintained by him for his own selfish ends and purposes; that in addition to the $10,560.16, so as aforesaid received by the said Chetwood out of said fund, he is now openly and shamelessly claiming that he is entitled to receive the remainder of said trust fund in repayment of his alleged costs and expenses and of the fees of attorneys employed by him in the suits and proceedings at law hereinbefore set forth, and to that end asserts and claims that he is entitled to have paid to him out of the moneys now in the hands of said agent or that hereafter may come into the hands of said agent for the shareholders of said defendant banking association, and out of the trust fund so as before referred to, his costs and expenses and the fees of an attorney employed by him to oppose your orator's motion in the superior court of the city and county of San Francisco to have turned over to him the balance of said trust fund so that it might be distributed among the shareholders of said defendant banking association, and the costs, expenses, and fees of an attorney employed by him to oppose the appeal of your orator in the supreme court from the order of the superior court refusing to turn over said money to him, and that he is also entitled to have and receive his costs and ex-
71 penses and the fees of an attorney employed by him in the insolvency proceedings in the superior court of Alameda county and in the supreme court upon the appeal of your orator from the order adjudicating the said Richard P. Thomas insolvent, and also his costs and expenses and the fees of an attorney employed by him opposing the application of your orator before the supreme court for the writ of certiorari to review the order of the superior court of the county of Alameda, modifying the order adjudicating the said Richard P. Thomas insolvent, and also his costs, expenses, and the fees of an attorney employed by him in the superior court of the county of Alameda in the suit brought by him as assignee in insolvency against your orator, the defendant banking association, and another, as hereinbefore set out, and that he is also entitled to receive his costs and expenses and the fees of solicitors, counsel, and attorneys employed by him in suits and proceedings at law brought by him, not hereinbefore referred to, but hereinafter more specially set out, together with the costs, expenses, and fees of attorneys to be employed by him to commence such suits or legal proceedings as in his judgment he may consider necessary to the protection of his own interests as aforesaid.

XV.

Your orator further avers that he is informed and believes, and upon such information and belief avers, that, under the national banking laws of the United States, when the defendant banking association was declared insolvent by the Comptroller of the Currency of the United States as aforesaid and the receiver appointed as aforesaid that
72 the board of directors of said banking association ceased to act and thereafter there could be no legal action on the part of said board of directors; that notwithstanding said fact the said Chetwood did, on or about the 26th day of September, 1895, procure certain members of the board of directors of said banking association to hold a meeting, and which said members, as your orator is informed and believes, and upon such information and belief avers, constituted less than a quorum of said board, at which said meeting they proceeded to exercise the powers of a board of directors of a national bank, and thereupon proceeded to pass and did attempt to pass a resolution declaring the office of the said Richard P. Thomas as president and director vacant, and thereupon proceeded to elect and attempted to elect a director in the place of said Thomas, whose name is unknown to your orator, and at the same time attempted to elect one William K. Vanderslice as president of said corporation in the place of the said Richard P. Thomas, on the principal ground that a judgment had been recovered by the banking association against the said Richard P. Thomas, and that he had appealed to the supreme court from the judgment, and further proceeded to pass and did attempt to pass another resolution, reciting that your orator was unduly and illegally elected agent of the bank and has no valid right or title to the office of such agent, and authorizing the commencement of a suit to oust and remove your orator from said office, and that such action was taken by the members of the board of directors present at said meeting, although
73 the articles of association of said defendant bank provided that the president of said bank could not be removed except by a two-thirds vote of the entire board of directors; and thereafter and in furtherance of his said scheme to harass, impede, and embarrass your orator in discharging the duties of his office the said Chetwood caused to be served on the 7th day of November, 1895, upon your orator a paper purporting to be signed by W. K. Vanderslice, claiming to be the president of said banking association, and to have been served by the order of said alleged board of directors, and which said paper is in words and figures as follows, to wit:

"SAN FRANCISCO, *November 7th*, 1895.

Thomas K. Stateler.

SIR: Take notice that the California National Bank of San Francisco (a corporation) wholly repudiates you as its agent; denies that you have any right whatever, in any way or manner or at all, to represent its shareholders as such or to represent said corporation in any way or manner or at all, and that it will hold you

responsible for any and all interference with its affairs, business, or property.

Further take notice that said corporation, the California National Bank of San Francisco, hereby demands that you forthwith deliver unto the said corporation, through its board of directors, all the money, credits, property, assets, and choses in action of and belonging to said corporation now in your possession or under your
74 control, and that you desist from all interference with the affairs, property, and business of said corporation, and that you cease all proceeding and conduct as agent for said corporation or its stockholders as such, and that you dismiss the two several appeals by you hitherto taken to the supreme court of the State of California as agent for said corporation, the same being in said supreme court appeal cases 'S. F. No. 91 and S. F. No. 266.'

By order of said board of directors.

W. K. VANDERSLICE,
President of the California National Bank of San Francisco."

XVI.

That thereafter and in pursuance of his said scheme to harass, impede, and delay your orator in discharging the duties of his office and to increase his claim against the funds of the shareholders of said defendant bank by incurring costs and expenses and employing solicitors, attorneys, and counsels, and notwithstanding that the said Chetwood well knew that no right of action existed in favor of said defendant banking corporation, and that the board of directors of said corporation could not legally act, the said Chetwood filed in this honorable court a bill in equity entitled "The California National Bank of San Francisco (a corporation) & John Chetwood, Jr., a stockholder in and special trustee for said bank, complainants, *vs.* Thomas K. Stateler, defendant, and which
75 said bill of complaint purported to be signed by the said John Chetwood, Jr., as solicitor for the complainant The California National Bank of San Francisco, and by A. W. Thompson as solicitor for the complainant John Chetwood, Jr., and purported to be verified by the said W. K. Vanderslice as the president of said bank, and that the material allegations in said bill and upon which the relief therein asked for and hereinafter set forth was predicated are as follows, to wit: That The California National Bank, the defendant here, was incorporated under the national banking laws in 1886, and that upon its incorporation the stockholders adopted a code of by-laws, one of which is that the stock of the bank is transferrable upon the books of the bank only; that Richard P. Thomas was president of the bank until the 26th day of September, 1895, when he ceased to be president and W. K. Vanderslice assumed the office, and ever since its organization the bank has had and still has a board of directors qualified to act; that the bank suspended payment on December 13, 1888; that the cause of its failure was the gross carelessness of certain of its directors in permitting the cashier to loan the moneys of the bank

without proper supervision; that the comptroller adjudged the bank insolvent and appointed a receiver to take charge thereof. It then alleges the commencement of the suit brought by said Chetwood in the superior court and the payment of the $27,500 into court and the recovery of the judgment against Thomas for $139,718, as hereinbefore set forth; that at the time the bank failed Thomas had standing in his name 490 shares of the stock and no more; that an assessment was levied by the
76 Comptroller of the Currency upon the stock, and that certain of the stockholders failed to pay the assessment; that the act of Congress providing for the election of an agent is unconstitutional; that Stateler was elected agent, as set forth in this bill, but that some of the stock that voted for him was transferred upon the books of the bank after the bank failed, and some of it was not fully paid as to the assessment claimed to have been levied upon it. It then proceeds to allege that your orator is in collusion with Thomas, because the stock that elected him was virtually the stock of Thomas. It then alleges Stateler's application to have the balance of the $27,500 turned over to him, the refusal of the superior court to turn it over, and Stateler's appeal from the order to the supreme court; that Stateler has also appealed from the order adjudicating Thomas insolvent, as herein set forth; that by reason of Stateler's conduct in the premises the said Chetwood has been embarrassed and hindered in discharging the duties of his trust, and that Stateler has injured and damaged the corporation in the sum of $5,000 by asserting that he is the agent or qualified to act as such, and also attacks the action of the Comptroller of the Currency of the United States in qualifying and commissioning your orator as such agent, and the relief sought for by said bill is, as therein set forth, to procure the issuance of an order to show cause why your orator should not be restrained from further prosecution of his appeal in the supreme court of the State of California and from further claiming to be the agent of said bank, and that in and
77 by said order to show cause your orator be restrained until the determination thereof, and that upon the return day of said order to show cause a provisional or temporary injunction be issued restraining your orator from prosecuting said appeals and from further claiming to be the agent of said bank, and that upon such determination of said cause the injunction be made permanent and your orator be ordered to dismiss his appeals in the supreme court of the State of California, and to deliver to the corporation, through its board of directors, all the money or other property belonging to the defendant bank that had come into his hands, and that the bank have a judgment against your orator for $5,000 damages.

XVII.

That upon the filing of said bill in this honorable court the said Chetwood applied, on said bill and on certain affidavits filed at the same time, for an order restraining your orator as prayed for in said bill, and particularly from further prosecuting his appeal in the

supreme court of the State of California from the judgment of the superior court of said city and county of San Francisco as aforesaid, and that thereupon this court refused to grant a restraining order, but did issue its order to show cause why a restraining order should not be issued, and made said order to show cause returnable on the 2nd day of December, 1895; that thereupon and on said day the said Chetwood, in furtherance of his scheme to impede, harass, and delay your orator in discharging the duties of his office, filed an affidavit in the supreme court of the State of California
78 in the matter of the appeal of the said Stateler from the order of the superior court of the city and county of San Francisco, and at the same time gave notice to your orator that he would move said supreme court on the 18th day of November, 1895, for an order staying all proceedings in the matter of said appeal until the determination of the action so as aforesaid brought by the said Chetwood in this honorable court; that no session of the supreme court of the State of California was held on said 18th day of November, 1895, but said motion was regularly placed upon the banc calendar of said court, to be heard on the 2nd day of December, 1895, upon which said date your orator appeared, by his counsel, in said supreme court, but neither the said Chetwood nor his counsel were present in support of their application for a stay of proceedings, and that your orator filed an affidavit in reply to the affidavit of the said Chetwood in said matter and showed cause why said motion should not be granted, and the supreme court thereupon dismissed his application.

XVIII.

That thereafter and on the 2nd day of December, 1895, the order to show cause before this honorable court, in the action so as aforesaid brought by the said defendant, Chetwood, was partially heard in said court, and your orator appeared before this honorable court in response to said order to show cause, and filed his verified answer to said bill, in which all the material allegations of said bill were denied, and showed cause why the order sought for should not be made, and thereupon the said Chetwood asked for time to
79 file counter-affidavits; that copies of said affidavits have been served, and your orator has been anxious to proceed with the further hearing of said order to show cause, but the said Chetwood has opposed the setting of said order to show cause for the further hearing and has evinced no desire to proceed with the same.

XIX.

That your orator is informed and believes, and upon such information and belief avers, that he is not entitled in said action to any affirmative relief, nor is he in said action entitled to have the said bank or the said Chetwood enjoined from further interfering with him in the discharge of the duties of his office, and he is further informed and believes, and upon such information and belief avers, that the suit so as aforesaid instituted by the said Chetwood in this court cannot be maintained in this court, for the reason that this

court has no jurisdiction over the subject-matter or the parties hereto, for the following reasons, to wit: That the said California National Bank of San Francisco was duly adjudicated insolvent by the Comptroller of the Currency of the United States as aforesaid prior to the commencement of said last-named action, and a receiver appointed to take charge of its affairs; that said receiver has paid off the debts of said association and the shareholders thereof have met, as heretofore recited, and elected your orator as agent to wind up the affairs of the association, and under such circumstances a national bank can maintain no action to oust the agent from office or to enjoin him from winding up the association, and
80 has no legal capacity whatever to sue; and for the further reason that said suit is in effect a suit brought to review the action of the Comptroller of the Currency of the United States in declaring said bank insolvent and ordering the same to be wound up, and that this court has no jurisdiction to review in a suit pending before it the acts of the Comptroller of the United States; and for the further reason that the suit is brought to enjoin your orator in the performance of the duties of his office as an officer of the United States, and that under the law this court cannot enjoin your orator in the performance of such duties; and for the further reason that before the jurisdiction of this honorable court attached the supreme court of the State of California did, prior to the commencement of this action, duly adjudge and decree, in a proceeding duly pending before it, as above recited, that your orator was the duly elected, qualified, and acting agent of the defendant banking association, and that he was not in collusion with the said Richard P. Thomas, and that said questions have become *res adjudicata* and can no longer be inquired into by any court.

XX.

Your orator further avers that after the institution of the suit last above mentioned in this honorable court by the defendant bank and the said Chetwood the said Chetwood appeared in the superior court of Alameda county and did, on the 23rd day of December, A. D. 1895, cause to be filed in said court another and further suit entitled
"The California National Bank of San Francisco, a corpora-
81 tion, and John Chetwood, Jr., a shareholder in and special trustee for said bank, plaintiffs, *vs.* The Standard Soap Company, a corporation, *et al.*, defendants," the complaint in which said action is signed by the said John Chetwood, Jr., as attorney for the bank, and by A. W. Thompson, as the attorney for the said John Chetwood, Jr., and which said complaint is verified by one Charles H. Holt, claiming to be the vice-president of said corporation. The complaint in said action alleges that a judgment has been recovered by the said John Chetwood, Jr., for the benefit of the corporation against the said Richard P. Thomas, and that the said Richard P. Thomas is a large holder of stock in the said Standard Soap Company, and asks that a receiver be placed in charge of the business and property of said Standard Soap Company, which company is a

corporation organized and existing under and by virtue of the laws of the State of California, carrying on a general merchandise business in the city and county of San Francisco, and that upon the filing of said complaint the said Chetwood procured an order from said superior court of Alameda county for the said Standard Soap Company to appear on the 6th day of January, 1896, and show cause why a receiver should not be placed in charge of its property, and your orator is informed and believes that there is no merit in said action, but that said suit was brought by the said Chetwood for the purpose of enabling him to increase his alleged claim against this bank and its shareholders for services rendered by him as an attorney for said bank, and to that end the said Chetwood openly boasts and asserts that he is entitled to have
82 and receive out of the moneys now in the hands of your orator as agent of said bank, and out of such moneys as may hereafter come into his hands as such agent, and out of the balance of the fund in the superior court of the city and county of San Francisco, State of California, as aforesaid, not only the costs and expenses of said action and his own fees as attorney for said bank, but the fees and expenses of the attorney employed by him to represent him as a plaintiff in said action, and also claims and asserts that he is entitled to receive out of said fund the costs and expenses of the action so, as aforesaid, instituted by him in this court, together with a reasonable solicitor's fee for himself as attorney for the bank and a reasonable fee for the solicitor employed by him to represent him as a complainant in said action in this court; that heretofore, to wit, on the 31st day of December, 1895, the said Standard Soap Company caused to be served upon your orator a notice to the effect that they would hold him and his official bondsmen as agent of the bank and the moneys now in his hands or that may hereafter come into his hands belonging to the bank for all damages said corporation might sustain and all expenses it might incur by reason of the bringing of said action of said Chetwood against said corporation in said superior court of Alameda county, as above set forth, and a copy of which said notice is hereto attached, marked Exhibit "B," and hereby made a part hereof.

XX—A.

83 Your orator further avers that heretofore, to wit, on the 21st day of February, 1889, and prior to the commencement of any of the suits hereinbefore mentioned, S. P. Young, the receiver of the defendant banking association, did file in this honorable court a petition entitled "*In re* application of receiver of the California National Bank for the sale of personal property," and which said petition, among other things, recited that said California National Banking Association had been duly adjudged insolvent by the Comptroller of the Currency of the United States; that the petitioner therein had been by said comptroller duly appointed the receiver of such association, and that said petitioner had duly qualified as such receiver and entered upon the performance

of the duties of his office, and that as such receiver there had come into his possession certain personal property of said banking association, and thereupon in and by said petition the said receiver of said banking association thereupon submitted himself and the affairs of said banking association to the jurisdiction of this honorable court, as provided by the national banking laws of the United States and the amendments thereof, and thereupon asked for and obtained from this honorable court an order authorizing him to sell the property described in said petition, and to apply the proceeds thereof as provided by law, and that the filing of said petition was a necessary step in the winding up of the affairs of said defendant banking association; that thereafter and from time to time the said receiver did obtain from this honorable court orders directing him to sell various pieces of property belonging to said banking association and to
84 compromise various debts due to said banking association and did, as such receiver, institute in this honorable court suits to collect moneys due said banking association, all of which said proceedings and suits were necessary steps in the winding up of the affairs of said defendant banking association, and, as such receiver, did in every way and as provided by the Revised Statutes of the United States and the amendments thereto hold himself amenable to the orders of this honorable court; and your orator avers that the jurisdiction of this honorable court over the affairs of said defendant banking association did attach on the 21st day of February, 1889, as aforesaid, and that the affairs of said defendant banking association have never been wound up, but that your orator is now engaged in winding up the affairs of said defendant banking association, and that it will be necessary for him to bring various suits to collect the outstanding assets of said association, and, among others, a suit against the defendant John Chetwood, Jr., to recover the moneys so as aforesaid due and owing from him to the defendant banking association, and that it is necessary for him to bring this suit and to obtain the relief herein prayed for, so that he can proceed to wind up the affairs of said defendant banking association without further interference from the defendants John Chetwood, Jr., or the alleged Board of Directors of said insolvent association.

XXI.

Your orator further avers that as the agent of said de-
85 fendant national banking association he is an officer of the United States, and that under the statutes of the United States this court has jurisdiction over suits brought by or against him, and has throughout this whole controversy, as set forth in this bill, acted in accordance with the duties of his office, as he understands them, and has shown no partiality or favoritism to the said Richard P. Thomas or to any of the parties referred to in the bill, and that unless this honorable court restrains and enjoins the defendants, and particularly the defendant John Chetwood, Jr., from further harassing and delaying him in collecting the assets of said

bank and distributing the same among its shareholders and from bringing further suits and litigating suits already brought by the said Chetwood, either against your orator or for the alleged purpose of collecting the debts due said bank, the assets of the bank now in his hands or that may hereafter come into his hands will be subjected to liens for heavy attorneys' fees and expenses, which he believes is not in the interest of the shareholders of said bank, and that unless restrained and enjoined from commencing further suits against your orator or to collect the assets of said defendant banking association, the defendant John Chetwood, Jr., and the defendant corporation, through its alleged board of directors and its alleged officers, will further the litigation now commenced and commence new suits, claiming and asserting that they and they alone are entitled to hold and receive the assets of said defendant banking association, and will so increase their claims for expenses, costs, and attorneys' fees against the funds of said bank that if said claims are
86 finally allowed the entire funds now in the hands of your orator or that might hereafter come into his hands as agent and the fund of money now belonging to said bank in the superior court of the city and county of San Francisco, as aforesaid, will be wholly exhausted and your orator and his bondsmen will be called upon to pay any deficiency that may exist under the terms of his said bond; and your orator further avers that unless said Chetwood and the said bank are restrained from commencing further suits in support of their alleged claim to collect the assets of said bank that the parties will claim heavy damages from said bank and from its shareholders, and that under the terms and conditions of your orator's bond as agent he and his sureties may be called upon to pay such claims if they should be hereafter allowed against said bank.

XXI—A.

That it is the intention of the defendant Chetwood and the alleged board of directors of said defendant banking association, in any suit that may be hereafter brought by your orator to collect the assets of said association, to intervene in said suits and claim that your orator is not the duly elected, qualified, or acting agent of said defendant banking association, and they will claim that he was elected by the votes of a stockholder against whom, after he had been elected, a judgment was recovered by the defendant John Chetwood, Jr., for the benefit of said banking association, and that he is therefore disqualified from acting as agent of said banking association, and
87 will by every possible pretext and excuse seek to hinder and delay the collection by your orator, as agent of the defendant banking association, of the claim involved in such suit, and will in every way in their power endeavor to obtain a judgment in that case which shall seek to reopen the question decided by the supreme court of the State of California adversely to them, as hereinbefore recited, to wit, that your orator is the duly elected, qualified, and acting agent of the defendant banking association and entitled to hold, have, and receive the assets thereof, and that he is not acting in collusion with the said Richard P. Thomas or any one else.

XXI—B.

And your orator further avers that he is informed and believes, and upon such information and belief alleges, that there can be no legal defense interposed by the said John Chetwood, Jr., to any suit that may be hereafter brought against him by your orator, as agent of said defendant banking association, to collect the moneys so as aforesaid alleged to be due from said defendant Chetwood to said banking association, but that the said defendant Chetwood will in said suit resist the payment of said moneys and interpose all possible delays and obstacles to the collection of his said debt, and will again attempt in said action to raise the question of the election of your orator and collusion between him and the judgment debtor of said banking association, to wit, Richard P. Thomas, unless restrained from setting up said defense by the order of this court.

88 XXI—C.

Your orator further avers in the same connection that the said defendant, John Chetwood, Jr., has no authority whatever to collect the judgment so as aforesaid recovered by him for the benefit of the banking association against the said Richard P. Thomas, but that under the law of the State of California, in a court of which said judgment was so as aforesaid recovered, your orator, as agent of the defendant banking association, is alone authorized to collect said judgment, and that under no circumstances is a stockholder permitted to collect the judgment where he is a party to the action, but that where said corporation is not already in the hands of a receiver or agent, as in this case, it becomes the duty of the court in which said action is pending to appoint a receiver to collect said judgment; that no relation of trusts exists between the defendant banking association and the said John Chetwood, Jr.; and your orator further avers that the further commission of the acts complained of on behalf of said defendant Chetwood will produce waste and great and irreparable injury to the complainant and to the stockholders of said defendant banking association, and that the commission, pending the determination of this suit, of the acts herein sought to be enjoined will tend to render the judgment herein sought to be obtained ineffectual.

XXII.

That by reason of the action of the said defendants in opposing your orator in the discharge of the duties of his office it has
89 been necessary for your orator to employ counsel to represent him in the superior court of the city and county of San Francisco and present and argue the motion to have turned over to him the balance of the trust fund hereinbefore referred to; to employ counsel to represent him in the supreme court of the State of California on his appeal from the order of said superior court denying his said motion; to employ counsel in the superior court of Alameda county to represent him in the insolvency proceedings of the said Richard P. Thomas and to prevent the said Richard P. Thomas from being discharged from the judgment recovered against

him in favor of said defendant bank; to employ counsel to represent him in the supreme court of the State of California on the appeal which it was necessary for your orator to take in said insolvency proceedings to said supreme court; to employ counsel in said supreme court to present and argue and obtain the writ of certiorari which it was necessary for your orator to have issued by said supreme court to prevent the said defendant Chetwood from compromising and compounding the judgment against the said Thomas and appropriating the proceeds thereof to his own use; to employ counsel in this honorable court to defend the suit so as aforesaid brought against your orator by the defendants, and to employ counsel in this honorable court to represent him in this action; that the fees of counsel so as aforesaid employed by your orator will have to be paid out of the funds now in your orator's hands or that may hereafter come into your orator's hands as agent of said defendant bank, and that the employment of counsel in each
90 and every instance as aforesaid has been rendered necessary solely by the action of the defendants in impeding, harassing, and disturbing your orator in the discharge of the duties of his office.

XXIII.

That your orator is competent to collect each and every asset of said defendant bank if the same are collectable, and that he does not require the assistance of the defendants or either of them to enable him to collect said assets; that he is informed and believes, and upon such information and belief avers, that he has the exclusive right to collect the assets of said bank, wherever the same may be found, and to convert the same into cash under the orders of this honorable court, as provided by the national banking laws of the United States, and to distribute the same among the shareholders of said bank, as provided by said laws.

Wherefore, the premises considered, and inasmuch as your orator can have no adequate relief except in this court, and to the end that justice may be done, your orator prays the judgment and decree of this court adjudging that he is the duly elected, qualified, and acting agent of the defendant bank, to wit, The California National Bank of San Francisco, and as such exclusively entitled to have and receive in his custody and under his control all the moneys and property of said bank, and to collect the outstanding indebtedness due to said bank, whether the same be evidenced by open accounts, bills, notes, or judgments of record, to the
91 end that the affairs of the bank may be wound up, its property converted into money, and its money distributed among its shareholders, as provided by the national banking laws of the United States; that all the acts of the defendant banking association through its alleged board of directors, as herein set forth, since the appointment of a receiver to take charge of its affairs, as herein set forth, be adjudged null and void, and that its board of directors has no authority to take any action touching the affairs of the association; that the said bank, its board of directors, officers, and employees, and the said John Chetwood, Jr., his agents and

servants, and each and every of their said attorneys, solicitors, and counsellors, be forever restrained and enjoined from denying the rights of your orator to the said office of agent of said banking association, and from denying his right as such to the exclusive control of the assets of said bank, as above set forth, and from commencing any further litigation against him as such agent, and from prosecuting or defending any action heretofore brought by them or either of them against your orator as such agent touching his right to said office and touching his exclusive right as such agent to collect the assets of said bank, except the suit, now pending in this court, brought by them as aforesaid against your orator on the 12th day of November, 1895, and which suit your orator hereby especially exempts from the operation of any injunction that may hereafter be granted herein, and that the said bank, its board of directors, officers, and employees, and the said defendant Chetwood, his agents and servants, and each and every of their
92 said attorneys, solicitors, and counsellors, be forever restrained and enjoined from commencing any further suits to collect any outstanding debts due the said bank, whether the same be evidenced by an open account, bill, note, or judgment, and particularly from attempting in any manner to collect the judgment heretofore recovered for said bank against the said Richard P. Thomas and hereinbefore referred to, and from further prosecuting the suit brought by them in the superior court of Alameda county to place a receiver in charge of the Standard Soap Company, as hereinbefore set forth, and in the meantime may it please your honors to grant unto your orator an order upon the said defendants to appear before this honorable court at a day and hour named in said order, to show cause, if any they have, why an injunction should not be issued by this honorable court pending the determination of the matters involved in this suit and enjoining and restraining the said defendants and each of them as above set forth, and that until the hearing of said order to show cause and the determination thereof the said defendants, The California National Bank of San Francisco and John Chetwood, Jr., be restrained from any further commission of the acts sought herein to be enjoined, as above set forth, and that your orator do have herein such other and further relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, directed to The
93 California National Bank of San Francisco and John Chetwood, Jr., defendants herein, commanding them and each of them, on a day certain, to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to this honorable court may seem proper and required by the principles of equity and good conscience.

PIERSON & MITCHELL,
ROB'T A. FRIEDRICH,
Solicitors for Complainant, T. K. Stateler.

R. B. MITCHELL, *Of Counsel.*

94 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

T. K. Stateler, being duly sworn, deposes and says that he is the complainant in the within-entitled action; that he has read the foregoing amended bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

T. K. STATELER.

Subscribed and sworn to before me this 20th day of January, 1896.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

95 "EXHIBIT 5" (Continued).

"EXHIBIT A."

Minutes of a meeting of the shareholders of "the California National Bank of San Francisco," held at the office of S. P. Young, receiver of said bank, No. 230 Montgomery street, room 18, San Francisco, on the 6th day of July, 1894, at 3.30 o'clock p. m., pursuant to notice duly given.

Mr. Thomas Kierrulff, representing the receiver, Mr. S. P. Young, announced that the meeting was called for the shareholders to decide whether the receiver should be continued in office or an agent elected.

R. P. Thomas was nominated for chairman. The nomination being duly seconded, he was unanimously elected and took his seat as chairman of the meeting. William Clarke was then nominated as secretary, the nomination duly seconded, and he was unanimously elected as secretary.

The names of shareholders present, with the number of their shares and the number of their certificates of stock, *was* then called for by the chair. The following-named persons responded and presented the certificates of stock set opposite the names as follows:

Names of present holder & owner.	No. of certificate.	No. of shares.	Name to whom certificate was issued.	Name of endorser.
T. K. Stateler	49	10	Jos. Perkins	Jos. Perkins.
96 F. J. Kalley	50	10	Leon Golley	Leon Golley.
A. T. Eggleston	52	10	J. G. Pohle	J. G. Pohle.
Wm. Clarke	51	10	R. W. Andrews.	R. W. Andrews.
E. H. Forester	53	10	D. E. Dowling.	D. E. Dowling.
R. P. Thomas	35	5	R. P. Thomas	
R. P. Thomas	47	530	R. P. Thomas	
R. P. Thomas	40	50	R. P. Thomas	
R. P. Thomas	46	375	R. P. Thomas	
Peter McCarthy	48	10	Wm. C. Glass	Wm. C. Glass.

The chairman declared that ten hundred and twenty shares being present, and that number being a majority of all the stock of the association in value and number of shares, the meeting was duly organized for the transaction of business.

It was moved by A. T. Eggleston and seconded by T. K. Stateler, that all persons holding and presenting certificates of stock, being present in person or by proxy, be entitled to vote.

The motion was put and carried.

The number of shares voting aye being 1,020, and that number being a majority of the total stock of the bank in value and number of shares, the chairman declared the motion carried.

97 The chairman announced that it was in order to determine whether the receiver should be continued and wind up the affairs of the association or whether an agent should be elected for that purpose, and declared that the shareholders should vote by ballot in person or by proxy, each share of the stock entitling the holder to one vote, and the majority of the stock in value and number of shares should be necessary to determine whether the said receiver should be continued or whether an agent should be elected. William Clarke was appointed teller to canvass the votes. After all had voted the teller counted the ballots and announced the result as follows:

Voting to Discontinue the Receiver.

T. K. Stateler	10	votes.
F. J. Kalley	10	"
A. T. Eggleston	10	"
William Clarke	10	"
E. H. Forester	10	"
Peter McCarthy	10	"
R. P. Thomas	960	"
	1,020	"

Voting to discontinue the receiver—none.

The chairman declared that *as* 1,020 shares having voted to discontinue the receiver, and as that number was a majority of all the stock of the association in value and number of shares, the receiver would be discontinued.

98 A. T. Eggleston nominated T. K. Stateler for agent. The nomination was seconded by F. J. Kalley. No other nominations being offered, the nomination was declared closed and the chairman directed the vote to be taken by ballot and appointed William Clarke as teller. The vote was announced as follows:

For Agent T. K. Stateler.

F. J. Kalley	10	votes.
A. T. Eggleston	10	"
E. H. Forester	10	"
William Clarke	10	"
T. K. Stateler	10	"
Peter McCarthy	10	"
R. P. Thomas	960	"

After all the shareholders present, in person or by proxy, had voted, the secretary announced that 1,020 shares had voted for T. K. Stateler as agent, and no votes cast for any other person. The chairman declared that, as 1,020 shares were a majority of all the stock of the association in value and number of shares, T. K. Stateler was elected as agent.

John Chetwood, Jr., entered a protest in the name of Annie E. Blakeslee, holding eight shares of stock, against thirty shares of stock (formerly standing in the name of Mary C. Smith), on the ground of irregularity in transfer, as well as on all other shares against which assessments had been levied and not paid, being allowed to vote.

99 There being no further business to come before the meeting, it was adjourned to meet at the call of the chairman.

(Signed) WILLIAM CLARKE, *Secretary.*
R. P. THOMAS, *Chairman.*

100 "EXHIBIT 5" (Continued).

EXHIBIT B.

T. C. Van Ness. L. A. Redman.

Law offices of Van Ness & Redman, Mills building.

Cable address: "Van Ness."

SAN FRANCISCO, CAL., *December* 31*st*, 1895.

Mr. T. K. Stateler, agent California National Bank of San Francisco.

SIR: You are hereby notified that on the 23rd day of December, 1895, a suit was commenced in the superior court of the county of Alameda by the California National Bank of San Francisco and John Chetwood, Jr., against the Standard Soap Company, a corporation, and others, the purpose of said suit being to place a receiver in charge of said corporation, on the ground that a judgment had been recovered by the said Chetwood for the benefit of said corporation against Richard P. Thomas, who, it is alleged in the complaint, owns a large amount of stock in said corporation. The said Thomas has not since the year 1889 owned more than five shares of the stock of said corporation, a fact which the plaintiffs in said suit could have ascertained at any time by inquiry at the office of the corporation. To protect itself in this litigation and against this threatened appropriation of its property the corporation has had to employ counsel to appear and defend said case, and as the statutory

101 agent of said bank you are hereby notified that this corporation will hold you, as such agent, responsible for all costs, expenses, and damages which it may be subjected to by reason of said suit and will look to the funds in your hands belonging to said bank, or which may hereafter come into your hands, and your offi-

cial bond as such agent to recover all damages to which it may be subjected.

Respectfully yours,

VAN NESS & REDMAN,

Attorneys for the Standard Soap Company, a Corporation Organized and Existing under and by Virtue of the Laws of the State of California.

102 "EXHIBIT 6."

In the United States Circuit Court, Ninth Circuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Respondents. } Cause No. 12155.

Return to Order to Show Cause.

Obeying the order to show cause why a preliminary injunction should not issue herein, respondents respectfully claim that—

I.

This court has no jurisdiction to issue such writ.

The complaint shows that Stateler, by his appeal and certiorari thereon, has blocked all procedure for collection of the bank's judgment; that the order staying proceedings against the insolvent, made under section six of the insolvency law, prevents levy by execution; that the insolvency court could not so modify the stay as to permit execution process; that the appeal stays all action by or in the insolvency court; that Stateler by his appeal so
103 fully protects Thomas that neither the bank, Chetwood, Stateler, nor any one else can act against him in the way of subjecting his property to payment of the judgment, and that the time gained by Thomas through Stateler's appeal is at the debtor's command to consummate hiding of his assets, unless the direction of the supreme court is followed by "creditors' bill" to prevent such spoliation while the stay on appeal exists.

The complaint also shows that (as nothing can be done in the way of collection of the judgment, and the only thing by respondents being attempted is by such creditors' bill to prevent spoliation pending said appeal) the sole effect of an injunction herein will be to prevent such protection from spoliation and enable Thomas to utilize the delay and consummate concealment of his assets.

The bill of complaint further shows that Stateler will do nothing in the premises; that he will not stay such hiding of assets by Thomas; that unless these respondents or one of them be permitted to proceed with their action to protect the debtor's property from spoliation pending the appeal no one will do so, and by an injunction staying respondents from proceeding with the creditors' bill

the bank will be hurt, its creditor alone helped in his hiding of property pending the appeal.

By showing his certiorari proceeding the complainant herein also makes part of his pleading the result thereof, by which the supreme court of the State of California holds Chetwood the proper party to bring such creditors' bill in the premises (107 Cal., 540), and
104 an injunction herein will prevent compliance in that behalf with the direction of that court.

The bill of complaint also shows that all objections by Stateler to said creditors' bill, if any such he properly can have, as well as any purpose (if any such he has) to himself to maintain such action, can, by intervention by the laws of California, be taken and had in the suit by creditors' bill in the superior court of Alameda county, and said complaint herein points to maintenance of said action instead of injunction against it.

Said bill of complaint herein also shows that the superior court of San Francisco (administering the trust wherein is involved the judgment against Thomas) acquired jurisdiction in the year 1890, has ever since retained and still holds exclusive jurisdiction thereof, except in so far as aided by the Alameda county superior court through its insolvency procedure procured and compelled by Thomas.

The complaint herein also shows that the corporation, the comptroller, and receiver refused to have anything to do with or in anywise to enforce the trust involved in said San Francisco superior court suit wherein the judgment against Thomas was obtained; that the receiver declining to act was made a defendant to said suit; that Chetwood, the complaining shareholder and only person who would enforce the trust at the commencement of said suit in 1890, necessarily became, ever since then has been, and still is the sole trustee of and in the said suit wherein is involved the judgment against Thomas, the same being a part of the property developed and
105 created by said trust procedure; that said trustee, Chetwood (and not parties who refused to execute the trust in that procedure), is the proper person to administer the trust and guard from spoliation the property of the trust estate, and that on him devolved the duty (following the direction of the supreme court) to so guard from spoliation Thomas' property by creditors' bill pending Stateler's appeal.

The complaint herein also shows that by appropriate and binding adjudications (on issues framed and tendered in writing by Stateler) both the superior court of Alameda county in the insolvency procedure and the superior court of San Francisco in the trust suit have adjudged that as between Stateler and Chetwood the latter was entitled to control and administer the trust which involves protection from spoliation of assets of the trust estate or property which s-ould be applied in payment of the judgment which is part of said trust estate, and that neither of said adjudications have been changed, vacated, modified, or reversed.

The bill of complaint herein also shows that the injunction desired by complainant is not to prevent interference with action by

him in anywise or at all, but is solely to prevent restraint of Thomas from hiding his property.

The bill of complaint herein also shows that the California National Bank of San Francisco is a duly created, existing, and organized national banking organization, with its duly elected, qualified, and acting board of directors; that said corporation, duly acting under and through its said board of directors, repudiates
106 complainant herein as its agent, notifies him to desist from claiming to represent it and from interference with its affairs, but that he insists on claiming to be and act as its agent, despite the orders of said corporation and of its board of directors and contrary to the will of his assumed principal, the said corporation; that said corporation claims the right to protect its property and the assets of its debtor, Thomas, from spoliation pending Stateler's appeal, and the sole possible effect of an injunction herein must (and by complainant is intended to be) to prevent said corporation in any way or at all from protecting itself in the premises and to avoid spoliation of property applicable in satisfaction of its judgment while said appeal stays collection thereof.

Said bill of complaint also shows that by just, appropriate, and pending proceedings, to wit, by action No. 12140, in this court, the following issues between complainant and respondents herein are now before this court and under adjudication by it, to wit:

That because this corporation has never been dissolved by action of its shareholders or of the comptroller or at all the "agency" clause of the law under which complainant herein claims authority is not applicable; that his election depended on and was only by votes of shareholders indebted to the corporation as such whose liabilities were past due and unpaid when the alleged election was held; that his election depended on and was by shareholders who became such after the bank suspended payment; that complainant never in good faith or in fact gave bonds by shareholders of
107 the bank; that complainant's said election was by Thomas alone—was, and was by Thomas and Stateler meant to be, a fraud on the Government, the corporation, and all of its shareholders other than Thomas—in that Stateler was by such election to become ostensibly agent for the corporation, but really agent for Thomas, whose function it should be to protect Thomas upon and from the said claim of the bank against him, and because of said facts the corporation was entitled to and should have relief against the complainant herein to prevent his protection of said debtor, Thomas.

The said bill of complaint also shows that notwithstanding the pendency of said action No. 12140 to prevent complainant herein (respondent therein) from so protecting Thomas and aiding him to hide his property, this present action is brought and the injunction herein is sought solely to continue to aid Thomas in concealment of his assets.

The bill of complaint also shows that should an injunction issue herein, when case No. 12140 is determined in favor of the complainants therein, their decree will be of comparatively little value,

as Thomas (utilizing the delay on Stateler's appeal and of his injunction herein) will have successfully hidden much of his property.

The said bill of complaint also shows that should the injunction be granted the complainants in said action No. 12140 would measurably be impeded in their exposition of the truth; that there would be suppression of pertinent evidence against the complainant herein, respondent in that action, and due administration
108 of justice against him be interfered with.

The bill of complaint also shows that this court is herein by complainant requested to issue an injunction in direct contravention of section 720 of the Revised Statutes.

II.

The bill of complaint does not state facts sufficient.

The only real issue tendered thereby is, Shall Thomas, the judgment debtor, be permitted to continue secretion of his assets, or shall his property be protected from spoliation pending Stateler's appeal?

There is no question involved of collecting the judgment. That is stayed by said appeal, and the sole, pertinent question is, While that stay exists shall Thomas be prevented from getting his Standard Soap Company assets so effectually hidden as to make the judgment comparatively worthless when, that appeal being determined, the property may be reached either by execution or through the insolvency procedure?

Each and all of the matters following, which are set forth in said bill of complaint, are mere feigned issues, which in nowise affect the question whether an injunction shall issue to restrain protection of Thomas' assets pending Stateler's appeal, to wit. condition as to ownership of bank stock; whether or not the San Francisco superior court erred in making the settlement with Thompson and Wilson or in allowing counsel fees and costs or money to pursue Thomas through the insolvency court; whether or not complainant ought to sue Chetwood to recover said allowances made by said court; whether the receiver or agent ought to have appealed from said orders
109 or lost such appeals; how the $139,738 judgment against Thomas was gotten; whether the judgment ought to have been more or less and whether or not it was appealed from, no supersedeas bond having been given; whether the Alameda county superior court erred in refusing to substitute Stateler for Chetwood as assignee in insolvency; whether Stateler was justified in appealing from the order adjudicating Thomas an insolvent debtor; what the fate of that appeal is to be; whether Stateler did right in preventing segg*r*egation of the homestead and applying the excess in value over the exemption to payment of the judgment; propriety of the supreme court's ruling in the certiorari proceedings; advisability of depositing funds in banks other than the Bank of California; propriety of Chetwood's suit to get from Dowling the

1,020 shares of bank stock held by the insolvency court to belong to the insolvent's estate; what may hereafter be Chetwood's claims for compensation; whether the board of directors acted well in repudiating Stateler as the bank's agent; whether the receiver applied years ago to this court for advice as to sale of personal property; whether Chetwood may have any defense to a suit threatened by complainant; how fees of counsel may by divers courts be allowed or made payable, and all of the like extraneous matter pleaded in said complaint.

The averment in said bill of complaint that defendants in the Alameda county superior court suit (the creditors' bill by complainant herein objected to) claim to hold Stateler responsible for costs in that suit is especially a feigned issue and is also a self-contradictory one.

110 If plaintiffs in that suit can make the bank responsible for costs therein, it is because they have the right to bring it; without such right they could impose on the bank no responsibility. The bill of complaint herein stands on the assumption that the bank cannot protect itself in any way or at all, and that the shareholder trustee Chetwood is powerless to guard his trust. If that position is sound, then the plaintiffs in said Alameda county superior court suit cannot charge the bank with costs therein. If it is not sound, and they can make the bank responsible for such costs, it is because they had the right to bring the suit and should not be prevented by injunction from maintaining it.

As shown by the bill of complaint, the bank cannot suffer, and it may gain by protection from spoliation of its debtor's property pending Stateler's appeal. If volunteers try for the bank to get such protection, advance costs, and furnish requisite bonds in the sought-for and incidental receivership, by no possibility can the bank be injured, and it may, as shown by the bill of complaint herein, be assured the collection of its judgment by the procedure which prevents its debtor from utilizing the delay accorded him by Stateler's appeal to conceal his ownership of the Standard Soap Company and the property belonging to him concealed under that corporate name.

If such volunteers are unauthorized to represent the bank, they cannot bind it for costs or at all, though they may benefit it, and injunction to restrain from confer-ing benefit is a novelty.

111 III.

The Facts of the Case.

Without in anywise or at all waiving, but, on the contrary, insisting on the foregoing issues and propositions of law and on each of them, further to show cause why an injunction should not issue herein, why such injunction would interfere with due administration of justice, would cause great, needless, and irreparable mischief, and would be an aid to fraud and unlawful collusion, respondents now show the truth of this case by the following affidavits, to wit:

UNITED STATES OF AMERICA, } ss:
Northern District of California, }

John Chetwood, Jr., being sworn, deposes and says that in the year 1886 the California National Bank of San Francisco, incorporated for the period of 20 years, organized and began banking business, with a paid-up capital of $200,000, divided into 2,000 shares, a board of directors and code of by-laws. It has never been dissolved nor has its franchise been forfeited. It has always maintained and still maintains its corporate existence with its code of by-laws in force and its board of directors ready, willing, and competent to manage and administer its affairs.

Upon its organization this affiant became, ever since has been, and still is one of its shareholders. At said time of organization Richard P. Thomas was duly elected one of the directors and president of said corporation and of its board of directors.
112 He remained such president until September, 1895, when he was as to said office succeeded by W. K. Vanderslice, who then became and now is president on said corporation and of its board of directors.

Said corporation continued its banking business till December 15th, 1888, when it suspended banking business and closed its doors. Thereupon and within three days after said suspension the Federal local bank examiner took charge and possession of the bank's books and assets for and under the direction of the Comptroller of the Currency of the United States, who thereafter appointed his receiver to collect the assets of the bank, pay its debts, all expenses of the receivership, and provide for redemption of its circulating notes.

Said suspension was caused by loss of almost the entire capital through reckless and improvident transactions and use therein of the bank's money by its cashier, who was under the supervision of the president, and said transactions should not and never would have been made or had but for the gross carelessness of the president.

One of the above-mentioned by-laws made it the duty of the president to supervise and control details of the banking business and employees therein, with power to suspend them and otherwise prevent improper or improvident use of the funds. Thomas, as such president, and for discharge of his said duties, was accorded and paid a regular and sufficient salary throughout all the time from the commencement until the suspension of said banking business.

Another of said by-laws imposed certain duties on three
113 several members of an executive committee of the board of directors, of which committee the president was a member, said duties of the members of the committee being to aid the president in supervision of said banking business, but neither of the members of the committee as such nor the committee as a whole had any control thereof nor of the employees therein nor any power to suspend them.

After the appointment of the receiver this affiant, as a shareholder, requested the corporation, the comptroller, and receiver to

take action for said bank to recover from said president and the other two directors, members of the committee, the amounts of losses for which they might be legally responsible; but the corporation, the comptroller, and receiver each and all refused to take action in the premises. Because of those refusals this affiant, as shareholder and special trustee for the bank, brought suit to enforce the several liability of the president and of the other two members of the committee for such of the losses resulting from said transactions as they might severally be responsible for under the by-law concerning said committee and the main, several, additional, and separate liability of the president for his individual neglect to discharge the special duties imposed on him by the other by-law relating to the office of president.

To that suit, because of his refusal to bring it, the receiver was made and named as a codefendant with the president and other two directors. The receiver, when so made a defendant and as
114 such served with process, answered and followed his refusal to bring the suit by opposition and hostility thereto. He never changed his attitude of or abandoned his hostility thereunto, but he did waive service on him of notices and other papers in the suit after issue was joined therein.

In settlement of pleadings in said suit on demurrer to plaintiff's complaint, the receiver being before the court, the point was made that the receiver was the only party who could maintain such an action or therein represent the bank, and that control in the premises on behalf of the bank could only be exercised by him, and that therefore Chetwood should by order of the court be removed as plaintiff and the receiver be substituted for him as such. The court refused to accept said position and held that Chetwood was the proper party in the premises to represent the bank, for it — administer the trust involved and represent, act for, and be trustee of the bank therein. From the orders so refusing and so ordering no appeals were taken; the time for appeal therefrom has expired, and said adjudications that Chetwood was and is the proper person in said trust to act for the bank remain in full force.

The three defendants—the president and other two directors—in said suit appeared and conducted their several defenses separately, each one for himself, in and throughout the entire procedure. By each of said defendants, in and throughout the conduct and trial of said suit, it was vigorously contended that of the suit the receiver ought to and should have control. That issue was many
115 times presented to and by the court held adversely to said contention, and the decision of said issue never has been modified, changed, or reversed.

The cause was twice tried; by defendants a vigorous and exhaustive defense was made; the procedure, begun in July, 1890, continued until entry of judgment in November, 1894; many witnesses were examined and much documentary evidence was adduced. The two trials were presided over by different judges, each of whom recognized and in court announced that they observed the distinction between the responsibility of the two directors under the

by-laws concerning the committee, and that of the president under the by-law relating specially to him. The interlocutory order of April 27th, 1894, sending the case to a referee to compute the losses by the several complained-of transactions, did not fix the amounts for which judgments would go against the several defendants. At the close of the trial, after the referee's report, therefrom and from the testimony taken at the trial and a full record thereof which affiant had, it was apparent to this affiant and to his counsel, and on settlement of findings it must have become patent to the court, that while findings consistent with the complaint were by the evidence fully sustained against the president, Thomas, they were not fully sustained against either of the other defendants, Thompson or Wilson. It was inexpedient to attempt amendment, as such change of the complaint as to make it conform to the proofs would have endangered any recovery against Thompson or Wilson; it
116 might have caused dismissal of the action as to them; it would have made inevitable a new answer by and possibly a new trial as against Thomas, thereby entailing great additional expense, and have given Thomas time to carry out his threat theretofore by him made to this affiant that he would make himself execution-proof.

Wilson was a man of small means. He had gone to Massachusetts to live, but leaving his case in the hands of learned counsel, Messrs. Mastick, Belcher & Mastick. The evidence had shown as to Thompson that he had received no pay, was out of the State, or by illness detained from the bank much of the time while the complained-of transactions occurred, and was less than Thomas brought into contact with facts, conditions, and circumstances which should have caused prevention of the transactions.

While things were in this condition, overtures for settlement were made by the defendants Thompson and Wilson, through their respective attorneys, to this affiant and his attorneys, and it was, in affiant's opinion, that of his counsel, and, as affiant believes, that of the court, best to accept the settlement proposition made by Thompson and Wilson, and stand on the complaint as it was against Thomas, who was, as affiant was informed and believed, financially able to respond for the entire losses, the subject-matter of said complaint.

Thereupon, and being thereunto advised by his attorneys, this affiant concluded that he would, the court being willing, so accept said settlement. He thereupon, with his counsel and that of
117 said defendants, duly submitted the matter of said settlement to the court, which approved thereof, and, on its said approval thereof, the settlement as to which complainant herein complains was made.

As to said settlement, this affiant (from full examination of the law as to such representative suits and from the advice and counsel of his attorneys in said action) verily believes that he, this affiant, as plaintiff in said suit had entire control thereof and could lawfully have dismissed the same of his own will and motion alone; that under the law as laid down by the supreme court of this State

and many other eminent tribunals affiant had the legal right to act as aforesaid in the conduct of said suit and in said settlement thereof without advising with the court, but, as affiant averred in his affidavit in said court, hereafter referred to, of his own volition and by the advice of his counsel he consulted said court concerning every fact relating to said settlement and as to the making thereof, and affiant so acted wholly in good faith, with entire openness and out of regard to the dignity of the court and because he desired it to be in ignorance of nothing which in the administration of the trust he, this affiant and trustee, was doing or acting upon.

On such acceptance of the settlement and action of the court thereon, said defendants, Thompson and Wilson, paid the $27,500 into court in said cause, and the trust fund in the premises was started.

That, as to the allowance of counsel fees mentioned in the complaint herein, this affiant alleged that such allowance was by the court made direct to the attorneys for services by them rendered in the cause, the creation and enforcement of said trust; that the same was, as affiant is informed and believes, and therefore alleges,
118 a just and fair one. The same was made in open court, in the presence of the attorney who had in said court and cause appeared and acted for the defendant corporation, who objected to the making of the order of allowance and who formally excepted thereto.

No appeal has ever been taken from said order; more than a year has elapsed since its entry and payment of the money thereon to said attorneys (and if, as complainant threatens, he sues this affiant for the action of said court, the fact that he does so cannot affect the decision of this court herein, whether an injunction shall issue in an entirely different connection).

After said settlement and dismissal of Thompson and Wilson said court proceeded with the matter before it; on the evidence adduced at the trial made its decision of the cause, its findings of facts, conclusions of law, decree, and judgment against the remaining defendant, Thomas, against whom in November, 1894, it in due form rendered and entered a money judgment for the sum of $139,738, with legal interest from December 15th, 1888, in favor of this affiant, John Chetwood, Jr., as trustee of and for said bank. The legal title to said judgment and of the judgment debt was made to be, it always has been, and it still is in this affiant as such trustee. Neither the bank nor any one else ever had any legal title thereto or power over it, although the equitable title thereto and beneficial interest therein is in said corporation as such.

During the trial of said suit Thomas insisted that the cor-
119 poration, through him as its president, ought to have control and be therein the bank's representative, but the court held adversely to him on said proposition; ordered that in all matters of the trust involved the plaintiff Chetwood was the sole trustee, and as such the only party proper to represent the bank. The orders of said court still remain in force.

From the time of the suspension it was manifest that said losses were due to the gross carelessness of the bank's president; that for the amount thereof judgment could be had through due legal procedure against him, and of those facts he was aware. To evade payment of any such judgment Thomas conceived and promptly began to act on the scheme to get his property into the hands and names of friends to hold for him; go through insolvency; get his discharge and resume that property, freed from the anticipated judgment. Easy accomplishment of this scheme demanded lack of opposition from the corporation, and to insure that he planned (under section three of the act of Congress whereon complainant bases his claim herein) to elect an agent, ostensibly for the bank, really devoted to him, and who would do nothing to hurt, but all in his power to help him, in going through insolvency and avoidance of any judgment obtained by or in favor of the bank.

To control such election, when the suspension occurred, Thomas had not enough stock standing in his name, but (while the bank's books were, or should have been, in the bank examiner's custody, by *manes* unknown to affiant) Thomas procured to issue to
120 him and six other persons (who really had no interest therein, but were only acting for him) certificates of bank stock sufficient with what he already had to make 1,020 of the entire 2,000 shares, with which Thomas ultimately elected Stateler, who has thus far duly carried out his part of said scheme, as above suggested and hereinafter related in detail.

When the suspension occurred of said stock Thomas had in his own name but 400 shares. By the issuance of certificates after the suspension certificates for 470 additional shares were issued in his name, 10 in that of Perkins, 10 in that of Glass, 10 in that of Golly, 10 in that of Andrews, 10 in that of Pohle, and 10 in that of Dowling, making in all 1,020 shares.

January 18th, 1890, the Comptroller of the Currency in due form determined, and to all shareholders of the bank duly gave notice that he had determined, to enforce the personal liability of the said shareholders to the extent and amount of $37.50 per share on each and every one of the shares of stock of said bank, giving due notice of the time and place and to whom said liability was made payable, and in due form and manner made on each and all of the shareholders of said bank his call and demand for the payment of the respective amounts of money, corresponding respectively to the number of shares of said stock severally held by said stockholders. All of the shareholders of the 980 shares (other than the 1,020 shares held by Thomas personally or through his friends) duly responded to said call and demand, and paid full amount of
their respective liabilities thereon to the entire extent
121 of $37.50 per share on each and all of said 980 shares of stock held by them; but, as this affiant is informed and believes, and on his said information and belief alleges, Thomas never paid said call in full on his original 490 shares. On the 530 shares, certificates for which issued after the suspension, on 80 shares thereof said call was partly responded to, and as to the

remaining 450 shares it was not responded to at all, and thereon no payment ever was made. On 570 of the 1,020 shares said liability was but partly paid, and on 450 shares it was not paid at all; but the said liability as to and to the extent of said call is and when the election under which complainant claims to act herein occurred the same was overdue, delinquent, and unpaid partly on 570 and wholly on 450 shares, and the holders thereof were and are delinquent thereon, and their said liability was past due and unpaid when said pretended election was held and no votes whatever were cast for Stateler other than those by shareholders whose said liability was past due and unpaid, and this is the only election whereon complainant herein bases his right to represent said bank, bring and maintain this action, and claim an injunction to restrain the action to protect Thomas' property from spoilation pending Stateler's appeal.

Thomas, in pursuance of his said scheme and anticipating the judgment against him, procurred the comptroller (who was kept in ignorance as to the collusion and fraud on the bank involved) to act in the matter of getting the business out of the hands of
122 the Government and its officials when the debts and receivership expenses were all paid and call an election under said section three of the act of Congress, and said comptroller (incorrectly and in error in law, as is claimed by affiant) did hold and regard as applicable to a corporation which had not been dissolved the said section three of said act of Congress and called an election of the shareholders of said bank to determine whether an agent should be elected, and, if yea, to elect such agent.

At that election by Thomas' 1,020 shares alone Stateler's election was had. No other votes were cast, and the other shareholders protested because of the facts aforesaid and because of the manifest collusion involved.

At said pretended election neither of the six blocks of 10 shares each were voted by the parties to whom they had been issued; neither of said six persons was present, nor, as this affiant is informed and believes and as appears from the minutes of said meeting, was he represented by proxy or at all, and said sixty shares were voted by persons other than those to whom they were issued.

With regard to the allegation in said complaint that certain shareholders of the bank filed a bond in behalf of Stateler as agent, affiant avers that shortly after the filing of said bond S. P. Young, receiver of said bank, informed affiant that he had carefully examined said bond, and that none of the real shareholders appeared thereon, but only one or two names of the persons in whose names Thomas had placed stock in said blocks of ten shares to enable him to elect Stateler as agent signed or qualified on said bond;
123 and affiant avers that in contemplation of law under the national bank act such persons are not shareholders. Affiant has formally requested Stateler and his attorneys herein to furnish affiant the names of his said sureties, but Stateler has refused to do so, and affiant has written to or communicated with every one of the real shareholders of said bank except Thomas, and by each and

all of them or their personal representatives has been assured that none of said real, *bona fide* shareholders furnished or filed the bond of Stateler, as by the law required.

Upon information and belief affiant avers that upon a report of said meeting held July 6th, 1894, which was sent to him by said Thomas as chairman of the meeting, the Comptroller of the Currency and receiver (they being by Thomas kept in ignorance of the fraud being perpetrated and of the real animus controlling Thomas in the premises, and that he was in the matter of said meeting acting only ostensibly as president of the corporation, while really and in fact his entire conduct in the premises was and meant to be in antagonism to said corporation and to prevent it from collecting said judgment, rendition of which he anticipated) delivered over to said Thos. K. Stateler, the complainant herein, all the assets and property of said bank then in the hands of said comptroller or receiver, and said comptroller and receiver unto him executed a paper conveying the said assets and property so in their hands to said Stateler, and he, the complainant herein, has and purports to have
124 no other right to the control or custody of said assets and property than such as passed to him by the execution of said paper by the comptroller, neither did he, the said Stateler, procure from the said comptroller and receiver such conveyance until he found the same requisite for protection of Thomas in the insolvency procedure as is hereinafter mentioned, and his procurement of said conveyance was and was by him intended to be but a part of said scheme to prostitute the agency in the premises to the service of Thomas in avoidance of said judgment.

In pursuance of his said scheme to evade responsibility for said losses which had resulted from his carelessness and to avoid payment of the judgment against him in said superior court suit, said Richard P. Thomas, December 10th, 1894, filed in the superior court of the county of Alameda, State of California, of which said last-named county he then was and for many years immediately preceding said last-mentioned date he has been a resident, his petition in voluntary insolvency praying to be adjudged an insolvent debtor and be discharged from his debts under the insolvency law of the State of California, his said procedure becoming cause No. 10618 of and in said superior court of Alameda county. Thereupon, on Thomas' said petition, the superior court of Alameda county duly adjudged him an insolvent debtor; the usual notice to creditors to file claims and elect an assignee was given.

The meeting was held, and this affiant, representing said judgment debt, was elected, appointed, qualified, and he became the assignee in insolvency of said Richard P. Thomas. In and by his
125 said insolvency petition Thomas averred that he had no property or assets other than a certain homestead and personal property exempt from execution and worth only $200.

On information and belief affiant alleges that said averment was and is untrue; that said Thomas then was and he still is a person of large means, far in excess of the aggregate of his debts, including

said judgment, and is possessed of property which is, as above mentioned, hidden in the names and hands of other persons.

Accordingly and because Thomas was so, as aforesaid, fraudulently concealing his property, this affiant, as assignee under the provisions of said insolvency law, brought said Thomas for examination under oath before said Alameda county superior court to compel disclosure of his fraudulently hidden assets.

By said examination and disclosure it transpired and was shown that, without consideration, fraudulently, and to conceal the same from his creditors, said Thomas had put about $160,000 worth of his property into the hands of one of the six persons to whom he had, as herein aforesaid, put one of the said six blocks of 10 shares of bank stock, and that he had put all of the certificates of said 1,020 shares of bank stock into the hands of another of his coadjutors and temporary holders of another of said blocks of 10 shares of bank stock; that the first of said transfers was of about $160,000 worth of the stock of the Standard Soap Company, which belongs to said Thomas, and which he, fraudulently and without consideration, as aforesaid, had put into the hands of Julius G. Pohle, and the other of said transfers of the 1,020 shares of bank stock, also, as aforesaid, fraudulently and without consideration, was to D. E. Dowling;
126 that each and both of said transfers were fictitious and fraudulent as to creditors, were made without consideration, and solely to hide his property from his creditors, and of these facts the said Pohle and the said Dowling were fully aware when and in taking said transfers.

Thereupon, said last-mentioned facts being shown to the satisfaction of said insolvency court in said procedure and it being about to make the resultant orders as to delivery of said stock and of Thomas' property and interest in the Standard Soap Company, said Thomas became alarmed, and, as this affiant on information alleges, he applied to his tool and agent, Stateler, the complainant herein, to stop said proceedings in the insolvency court and cause by ousting said Chetwood from the assigneeship and getting the same into the hands of said Stateler ostensibly as agent for the bank, but really as the means for relief to Thomas therein.

Accordingly, January 28th, 1895, said Stateler, for the first time appearing in said insolvency procedure and for the first time acting, doing, or attempting to do anything whatever as agent under said transfer by the comptroller and receiver in the said insolvency court and cause, filed his affidavit, a copy of which is hereunto attached, marked Exhibit A, and made a part hereof, claiming that, as agent for said bank, he was entitled to represent its said judgment claim against Thomas and be his assignee instead of said Chetwood. This claim was contested for the bank by Chetwood, who, by affidavits, exposed the above and herein recited facts and showed that Stateler was Thomas' agent, whose sole purpose
127 in the premises was to deceive the insolvency court and aid Thomas in the concealment of his property. On these propositions raised by said affidavits and counter-affidavits by Stateler by which was distinctly raised and presented to the court as the sole

issue of facts in the premises that Stateler was acting in bad faith therein, counter to the interests of the bank which he assumed to represent, and for the sole purpose of aiding Thomas in prevention of the subjection of his assets to the insolvency procedure, and especially to prevent the further taking of testimony liable to expose Thomas' property and show that he had sworn falsely in his insolvency petition, in that he therein said he had included and shown all of his property, when in truth he had not, but had concealed and was concealing it in the hands of Dowling and Pohle.

That nothing whatever was said or by Stateler indicated in his affidavits showing that he, Stateler, had not received his assignment from the comptroller and receiver, but, on the contrary, in the whole of said procedure, and as shown by his own petition, he assumed that he was the duly elected, qualified, and acting agent of the bank, and as such appeared in the premises; that it is not true that the superior court of Alameda county refused to recognize Stateler as agent because his commission had not reached him; all of the assertion is made but to distract attention from the fact that on the issue of bad faith the said court found against him. As a matter of fact and as shown by the record of said matter in said insolvency procedure, the said superior court of Alameda
128 county, on full hearing and due consideration of the matter as presented to it on the verified petition, affidavits, and counter-affidavits on Stateler's said attempt to remove Chetwood and become substituted as assignee, held that said attempt was but a part of Thomas' scheme to conceal his assets, and that Stateler's action was, solely as Thomas' agent and adversary to the bank, held and decided adversely to Stateler, refused to remove Chetwood as assignee and refused to appoint Stateler as such assignee; all of which is of record and appears in due form in the record of the insolvency procedure aforesaid.

The petition and final order, as shown from the record in said cause and herein by a copy thereof, is marked Exhibit B and made a part hereof.

That thereupon and thereafter, Stateler having failed in his said attempt to arrest the taking of testimony, the said superior court of Alameda county in due form proceeded with the examination of Thomas and of D. E. Dowling, under oath, in open court and in the presence of the official stenographic reporter, in due and usual form, who duly took his stenographic notes of said testimony, showing it in full and the entire procedure had on said examination of Thomas and Dowling, and thereafter the said official stenographic reporter, in usual form and manner, transcribed into longhand his report of said testimony, showing just what was said under oath by the said Thomas and Dowling; which said report in longhand is now ready to be produced and read should this court now direct.

129 That by the said report it appears and is shown and so the facts are that on his said sworn evidence Thomas showed and proved that the property of the Standard Soap Company was

of large value and paid a net annual revenue of about $14,000; that he was originally and prior to his alleged assignment to Julius G. Pohle, hereinafter mentioned, and at the time of the alleged assignment to Pohle he was the owner of more than half of the stock of said company and of nearly, if not quite, nine-tenths thereof; that he had assigned the said stock to Pohle for an alleged debt which was palpably a fraud, never had any considerable existence, and, if it ever existed at all, had become outlawed; that he, in consideration of said debt, together with a vague, indeterminate, and wholly worthless mining property, as to which he, Thomas, had no information or knowledge as to its value or whereabouts and which he finally gave away, *he* turned over to Pohle a note of $65,000 by him, Thomas, held against said Standard Soap Company, and all of his stock in said Standard Soap Company except five shares; that by his said testimony under oath Thomas showed with reasonable certainty, and as now appears by said record of his testimony ready to be produced should this court so direct, that said transfer to Pohle was palpably a sham, by Thomas made only to conceal his property and hide it from application in payment of the losses to the bank, for which he realized that he was to be held liable; that by his said testimony and the record thereof, now ready to be produced should this court so direct, the said Thomas showed that, following the same purpose of hiding his property, he had, shortly before filing his petition in insolvency, transferred his 1,020 shares of stock in the California
130 National Bank of San Francisco, on which he had elected Stateler agent as aforesaid, to D. E. Dowling, an employee, under Thomas, of said Standard Soap Company; that said transfer to Dowling was also a sham, without consideration, intended to be, as it was, a part of Thomas' said scheme to avoid the payment of the said claim of the bank against him. On due citation, Dowling was brought before the court, and on compulsion his testimony showed, as that of Thomas had already done, that the transfer of the 1,020 shares of bank stock to him was a sham and without consideration, intended to be a concealment of the property of Thomas, as is herein aforesaid. By said testimony of Thomas and Dowling, the court's stenographer's report of which, duly transcribed into longhand, is now ready to be produced should this court so direct, the said superior court of Alameda county in said insolvency proceeding ordered Dowling to deliver the said 1,020 shares of stock of said California National Bank of San Francisco to this affiant, John Chetwood, Jr., the assignee in insolvency of said Richard P. Thomas. Said Dowling refused to do so; was cited before said court to show cause why he should not be punished under contempt procedure for contumacy for not obeying said order. In response to said citation and order to show cause why he should not be punished, Dowling appeared before said court and under oath testified that he had, before service on him of the order to deliver the stock, transferred the same and delivered the certificates thereof to one D. F. Parker, who then was a resident of Ogden, Utah, and connected in

business matters with Thomas and said Standard Soap Com-
131 pany, and that he, Dowling, therefore could not obey the order of the court and deliver the certificates of stock to said assignee, Chetwood, and that his, Dowling's, said transfer to Parker was a *bona fide* sale to him; that Parker had the certificates, was out of the State, and that therefore he, Dowling, could not obey the order and deliver said stock certificates; and thereupon and because he could not comply with the order of court, and not otherwise, the order to show cause why he should not be punished was discharged.

Affiant, having strong — to believe Dowling's above testimony to be perjured, on March 14th, 1895, caused a new citation in said insolvency court and procedure to be issued and served on said D. E. Dowling, him to compel to make more full disclosure as to property of said insolvent debtor, and him, the said Dowling, directing to appear before said court March 19th, 1895, and be further examined in the premises under oath. March 18th, 1895, Thomas K. Stateler, the complainant herein, appeared before said court still claiming to be the agent for the California National bank, but, as this affiant claims and alleges, still acting only for and in the interests of Thomas and adversary to the bank, filed in said insolvency cause a small and doubtful claim. Said claim was on a promissory note (which appears in the record in the appeal taken by Stateler from a certain order of the superior court of San Francisco to be an unsigned note), and the same was filed by Stateler solely to get standing in said insolvency procedure in order to appeal therefrom,
lock the whole matter up in the supreme court so as to get
132 for Thomas the benefit of the delays incident to such appeal and enable Thomas and Dowling to avoid further examination under oath. Accordingly, on the same day and with his small claim, Stateler, claiming to be a creditor of Thomas, in due form filed and on this affiant served his notice of and $300 statutory bond on appeal, and thereby succeeded in his effort temporarily to protect Thomas and Dowling from further testifying and giving to them the benefit of the delay incident to said appeal and time within which to consummate their said fraud.

That said appeal was not in good faith, but is only colorable, and was taken solely for time wherein Thomas and Dowling could consummate the said fraud and fraudulent hiding of the said certificates of bank stock. The person to whom Dowling in his testimony had sworn he had transferred the stock and who was out of the State, to wit, D. F. Parker, was afterwards by Thomas (who believed that he could use Parker as he had done Dowling to fraudulently conceal property) induced Parker to come to California and accept the office of secretary of the Standard Soap Company, under the name of which Thomas held sufficient property to pay the whole of said judgment, or nearly so.

As this affiant is informed and believes, and on his said information and belief alleges, said Thomas made a grave error in assuming that Parker would so aid in said fraudulent scheme; that when Parker reached California and became fully informed as to what

was required of him by Thomas in furtherance of his fraudu-
133 lent scheme to hide property he refused to assist in said fraudulent scheme, and thereupon notified Thomas that he would not commit perjury and would not swear that the transfer to him was in good faith when in fact it was not, and that should he, Parker, be called upon under oath to testify in the premises he would tell the truth, the whole truth, and nothing but the truth; that Thomas, seeing and being by Parker so informed that he could not use Parker in furtherance of his said fraudulent scheme to hide said bank stock, directed the said Parker to transfer the stock to R. B. Mitchell, and said Parker accordingly did transfer and deliver the said certificates to said Mitchell under the said order and direction, and this affiant is informed and believes, and on his said information and belief alleges, said Mitchell received said stock and is holding it, as Dowling did, for Thomas.

That, as this affiant is informed and believes, and on his information and belief alleges, the said Robert B. Mitchell, throughout the entire proceedings in the insolvency court, after the appearance of said Mitchell therein as attorney for Dowling, he, the said Mitchell, was in the employ of Thomas, counseling him in the premises and acting as his counsel throughout all of the matters therein and hereinafter alleged, and that in taking the said stock from Parker he took it for Thomas with full knowledge of all of the facts which had been shown on the examination of Thomas and Dowling before the insolvency court and wherein he, Mitchell, was the attor-
ney ostensibly for Dowling, but really for Thomas; that
134 subsequent to the matter of the transfer of said stock, of all the details and circumstances of which on information and belief affiant alleges Stateler knew, and because of Stateler's assistance to Thomas to carry out his fraudulent scheme of hiding property, and because Stateler was but the agent of Thomas in the premises and in the matter of becoming agent for the shareholders of the California National bank, he, Stateler, was acting in the interests of Thomas and adversary to the said bank and its shareholders, and because the agency clause of the national bank act is not applicable to corporations which have not been dissolved, and because Stateler never duly was elected or qualified as agent under said law, respondents herein, as complainants, commenced in this court cause No. 12140, entitled "The California National Bank of San Francisco and John Chetwood, Jr., a shareholder in and special trustee for said bank, complainants, *vs.* Thomas K. Stateler, respondent." Said action was brought to restrain Stateler from further violation of his trust and from further aiding Thomas to hide his property.

In said cause No. 12140 respondents herein did all in their power, and they have herein done all in their power, to take the testimony of said Parker under oath to prove the above-recited facts as to the transfer of said bank stock by Dowling to Parker and by Parker to Mitchell, but respondent therein, complainant herein, availing himself through his counsel, said Mitchell, of legal technicalities and special restrictions incident to practice in this court, successfully

opposed the taking of such testimony and full exposition of the truth by Parker's evidence.

135 That Parker still is the secretary of the Standard Soap Company, of which, as is hereinafter alleged, Thomas owns about 9,600 of its 10,000 shares of stock, is in effect in Thomas' employ, and unwilling to testify in the premises and declines to make affidavit herein, but, as this affiant is informed and believes, and on information and belief alleges, if put on the witness stand or otherwise compelled to testify in the premises he, the said Parker, being a man of veracity, can and will swear to the above-recited facts as to said bank stock of his own knowledge.

That as to said matters absolutely within the knowledge of Parker affiant makes this present showing because Parker will not voluntarily do so, and these respondents cannot him thereunto compel.

In and throughout the matter of examination of Dowling as to said transfer to him by Thomas and by him, Dowling, to Parker of said bank stock the said attorney, Robert B. Mitchell, Esq., was and acted as the attorney ostensibly for Dowling, but really for Dowling's principal in said transactions, the insolvent debtor, Thomas, whose attempt to conceal property was the subject-matter of the hearing before said insolvency court in said cause, and said Mitchell was also in the matter of taking said delay appeal acting as the attorney for the complainant herein, Stateler.

That the interests of the California National Bank of San Francisco and of all of its shareholders other than Thomas *was* directly adversary in all of said matter as to the bank stock, whereof

136 examination was being had before said insolvency court, to that of Dowling. While the interest of Thomas in his attempt to conceal his property under investigation was in strict accord with that of Dowling, the entire controversy involved in said examination was whether Thomas and Dowling, acting in concert, should succeed in keeping hidden and out of reach of said insolvency court the said bank stock and application of the value thereof in payment of the bank's said judgment against Thomas through the only available means, to wit, said insolvency procedure. In and throughout said matter Stateler, claiming to act as agent for the bank, but really acting in concert with its debtor, Thomas, did all things possible to aid Thomas in hiding his property, and filed his small claim and took his appeal solely to give Thomas and Dowling time in which to carry into full effect Thomas' scheme to avoid payment of said judgment debt.

By failing to include his property, said bank stock and Standard Soap Company stock, in the schedules of his assets accompanying his petition in insolvency, and the establishment in the insolvency procedure by the decree and orders already made therein upon said examination that he was in said insolvency procedure concealing property not exempt, it had become clearly apparent that Thomas never could be discharged and never could get his discharge from his debts through, by, or in said insolvency procedure because of the provisions in said insolvency laws against such discharge where there had been such failure to exhibit by said schedules

all of his assets, where there had been attempts made by the
137 debtor to conceal property or had by him been any false swearing in the cause, but the insolvency law, with its quasi-criminal proceedings and provisions against fraudulent concealment of the debtor's property, was becoming to Thomas and Dowling assurance of defeat in their effort to hide property, and personally very dangerous. It was therefore to the interest of Thomas and Dowling to abandon so much of Thomas' original scheme as involved the insolvency procedure and to get rid of said insolvency cause and get it wholly out of court, while it was the manifest interest of the bank and of all of its shareholders other than Thomas to retain the cause in said insolvency court, therein push the examination and orders for delivery of Thomas' property to the assignee in insolvency, who was and is the only real representative of the bank in the premises. In said matter of retaining the cause in the insolvency court the interests of Dowling and Thomas were necessarily adverse to those of the bank and of all of its shareholders other than Thomas, and it was Thomas' real desire and interest to get out of said insolvency cause and court. Thomas could neither appeal from nor attack the order adjudging him an insolvent debtor on his own petition nor object to jurisdiction of the insolvency court obtained by his said petition. There was no possible way by which such attack on the jurisdiction could be made or appeal taken other than by one claiming to be a creditor of and pretending to be adversary to Thomas, unless through some sort of consent by this affiant to dismissal of the insolvency cause. Accordingly and solely to aid Thomas and Dowling to get rid of said insolvency cause and court, or, if that should be impossible, to give them time to
138 escape from the results of their perjury therein and on new lines enable Thomas to reconstruct and carry out his scheme for holding his assets, Mitchell, acting for Thomas and Dowling, first tried to induce this affiant to consent to dismissal of the insolvency procedure, but affiant refused so to do, and on such refusal, solely to aid Thomas and Dowling, Stateler filed in said insolvency cause and court this claim for $1,885, as agent for the California National Bank of San Francisco, against Thomas and took and perfected his appeal to the supreme court of California.

On information and belief affiant further avers that a clear and definite understanding, agreement, and conspiracy prior to the time of Stateler's alleged election as agent existed and still exists between T. K. Stateler, the complainant herein, and Richard P. Thomas, the above-named insolvent debtor, wherein and whereby the said Stateler has undertaken and agreed to, in every way and manner possible, hamper, prevent, and delay the execution and collection of the aforesaid judgment against said Thomas for the benefit of the bank, and to give to said Thomas every possible chance, occasion, means, and opportunity to avoid payment of the same; and your affiant also avers that the aforesaid various actions and proceedings of Stateler to aid and screen Thomas in the manner charged and alleged are partial evidence and proof of the said agreement and understanding and conspiracy between said Thomas and

said Stateler, and that this present procedure and suit are by Stateler part compliance with the said agreement, understanding,
139 and conspiracy between said Thomas and said Stateler; that this suit is not brought in good faith, but is solely for the protection of Thomas in the premises and to prevent the taking of testimony in the above-mentioned suit against the Standard Soap Company, Thomas and his wife, by the taking of which said testimony the said agreement, understanding, and conspiracy between Thomas and Stateler will be more fully and conclusively established and exposed.

And in further proof of said conspiracy your affiant avers and charges as follows, to wit, that during the progress of this action by your affiant, John Chetwood, Jr., against said Thomas and two other officials of said bank, in said San Francisco superior court suit, long prior to the alleged election of Stateler said Thomas voluntarily came to the office of said John Chetwood, Jr., and his attorney, A. W. Thompson, Esq., and expressed his belief that said Chetwood would recover judgment in said action, and that said judgment would be collected from the other defendants in said action. Said Thomas declared that he was or would be execution-proof in case judgment was entered against him, but said that he, Thomas, owned about ½ of the stock of the bank, and that he would divide said stock with plaintiff if in the action plaintiff would dismiss him, Thomas, therefrom, and that by the proposed division of said stock plaintiff, this affiant, and Thomas would profit equally by any judgment obtained against the other defendants to said action; that plaintiff, your affiant herein, refused to entertain the aforesaid offer and proposal of said Thomas, and thereupon
140 Thomas said to him that he, the plaintiff, would not be able to recover or collect anything from him, Thomas, because he was or would be execution-proof, and also that he, as a stockholder, would elect an agent under the provisions of the national bank act and through him control matters, and would so dispose of or place his said bank stock that plaintiff could not levy on or subject the same to any judgment against him, and that he, Thomas, would obtain ½ of the benefits of any judgment collected from any of the other defendants in said action.

That subsequent to the foregoing conversation and about a year before the meeting at which T. K. Stateler claims to have been elected agent another and prior meeting of stockholders of said bank was called to elect an agent, and said meeting went through the form of electing another agent than Stateler, but said other agent never qualified to serve, and no other proceedings were had or taken as to said other agent; that said Thomas attended said meeting and brought with him several other persons, to whom he had caused to be endorsed and delivered six several certificates of stock of said bank, and one of the persons so with Thomas and holding one certificate, obtained from him in the aforesaid manner, was said T. K. Stateler.

That after said meeting was called to order and its business begun said Thomas undertook to vote all the shares of stock by

him owned or controlled, including those aforesaid in the hands of the persons with him, one of whom was Stateler.

That several other stockholders than Thomas and those brought by him were present at said first meeting and strenuously
141 objected to Thomas voting said or any of his stock because of the liability of the holders thereof on the assessment levied by the comptroller, and which as to said stock remained and was unpaid; and at the same time and place this affiant, at said first meeting, gave all persons present, including Stateler, distinct and definite notice that a judgment was about to be rendered against Thomas in favor of the bank, and that all of the stock of Thomas would become the property of the bank, and that said Thomas' purpose in procuring and conducting said election and voting his said stock was to oppose the bank and its interests, and said Chetwood warned Stateler and all other persons present not to aid or abet Thomas in his wrongful and fraudulent designs of which and for the furtherance of which the agency election was but a part; but despite said warning and the opposition on the same grounds by various of the stockholders present and objecting as aforesaid, Thomas, Stateler, and the other persons acting with them, persisted in voting and did vote all of said 1,020 shares so as aforesaid held and controlled by Thomas; that during the various proceedings in the insolvency court of the county of Alameda, already referred to, R. B. Mitchell, Esq., of the firm of Pierson & Mitchell, had a conversation with John Chetwood, Jr., your affiant herein, and A. W. Thompson, Esq., his attorney; that the substance of the conversation between said Mitchell and Thompson is shown by the affidavit of said Thompson filed and presented herewith.

That at the time said conversations were had Messrs. Pierson & Mitchell were the attorneys of record for D. E. Dowling, an
142 employee of Thomas as aforesaid, and said Pierson & Mitchell therein acted and were also attorneys of record for and represented T. K. Stateler; that in the conversation held with Chetwood said R. B. Mitchell openly and clearly intimated that he was consulting the interests of and acting for said Thomas, and he, Mitchell, said that he thought he could pull Thomas through, or words to that effect, but spoke regretfully of Thomas having filed his petition in insolvency, and said that he had been a fool to do so, and requested this affiant to agree to abandonment of the insolvency procedure and go after Thomas on the judgment, which affiant declined to do, and in said conversation Mitchell more than once referred to the going of Thomas into insolvency as a great mistake on the part of Thomas and one that Mitchell seemed to regard as very dangerous to Thomas. Said Mitchell further stated that he was going to try and reverse the order declaring Thomas an insolvent debtor on account of a defect in the original petition, mentioning a mere technical defect, if any there was, and one that, to the mind of affiant and that of his counsel, was wholly unimportant, and that any attempt to reverse said order was and would be wholly without merit.

And your affiant further alleges that at the first meeting, held in

1893, as aforesaid, to elect an agent of said bank, W. K. Vanderslice, a stockholder and director thereof, and S. P. Young, its receiver, were present and heard this affiant object to and condemn the election of an agent, as is herein aforesaid; that on the petition and motion of said Stateler, hereinbefore mentioned, to be
143 substituted for affiant as the assignee in insolvency of said Thomas, said Vanderslice and said Young presented and filed their affidavits of what occurred at said meeting, and said affidavits became a part of the record in said insolvency proceedings.

A copy of said affidavit of Vanderslice is filed herewith, made a part hereof, marked "Exhibit C," and that of Young is identical therewith.

On such appeals as that by Stateler taken in said insolvency procedure no supersedeas bond other than the $300 bond for costs is required, but such $300 bond stays proceedings till the appeal is determined. Appeals to the supreme court of California involve delay of from 12 to 18 months, and Thomas has by said appeal, taken by Stateler, had about 10 months and will probably have about five more within which to perfect the hiding of his assets before said appeal will be decided and the insolvency court resume its proceedings for disclosure of Thomas' assets should the appeal be decided against Stateler, or such disclosure can be had on proceedings supplemental to execution should the appeal be sustained.

By the terms of the insolvency law, on adjudication of insolvency an order is necessarily made staying all proceedings against the insolvent and giving to the insolvency court sole jurisdiction in the premises, and it thence results that said appeal during its pendency prevents any action by creditors other than by "creditors' bill," as is hereinafter mentioned, and is directed by the supreme court of the State of California as to the collection of this judgment
144 against Thomas in the case of "Stateler *vs.* The Superior Court of Alameda County (107 Cal., 540)," so that by his said appeal Stateler, nominally acting for the bank and on its $1,885 debt against Thomas, is able to and he does prevent the bank from acting against Thomas at all (other than by a creditors' bill) and gives to Thomas time to hide his assets. This is the sole effect possible to and is the only one to be anticipated from Stateler's said appeal. Had that appeal not been taken Thomas would long ere this, by the insolvency procedure (the examinations, orders to disclose information, and quasi-criminal procedure incident thereto), have been compelled to turn over his hidden property, and the bank's claim against him on said judgment would have been collected. In and throughout all of said appeal and its incidental delay the complainant herein has been and he is adversary to the interest of said bank and of all of its shareholders other than Thomas, and is in accord with Thomas, and is aiding him, against the bank, in hiding his assets.

The trust fund in the San Francisco superior court suit was a source of danger to Thomas, as a small part of it was, by the direction of said court, being used to push the appropriate proceedings

against Thomas to collect the said judgment against him in favor of the bank, which, with interest due thereon, amounted to more than $200,000.

To prevent such use of any part of said fund Stateler (ostensibly as agent of the bank, but really for and to protect Thomas)
145 filed his verified petition in said San Francisco superior court and cause that the entire money of and in said fund should be turned over to him. On behalf of the bank affiant opposed the granting of said petition because Stateler was in antagonism to the bank, and in said opposition by affidavits showed that by his conduct in the premises, and as hereinbefore detailed, Stateler was in open hostility to the trust he claimed to be administering. By Stateler's petition and affidavits, on one side, and affidavits by this affiant and two of the directors of the bank, on the other, unto said San Francisco superior court was squarely presented the issue that Stateler was so in antagonism to his assumed trust; that his sole purpose was to prevent use of the only available financial means to protest said judgment, and that, so being in antagonism to the bank, its funds should not go into his hands. This issue was by said court decided in favor of the bank and Stateler appealed to the supreme court.

That complainant's present claim that he is entitled to protest the judgment is at variance with his attitude and language in said San Francisco superior court. In that tribunal, when the affidavits alleging collusion between him and Thomas were read, Stateler's attorney, R. B. Mitchell, Esq., felt constrained to and did state that he did not seek to interfere with protection of said judgment by this affiant, but only claimed the custody of said fund, and in his opening brief in the supreme court he takes the same position, using the following language: "Counsel for plaintiff seem to have misunderstood the motion in the lower court, and from the affidavits
146 filed by them are evidently under the impression that Stateler is seeking in this motion to control the judgment subsequently recovered against Thomas. This is a mistake."

This affiant further alleges that said corporation has duly maintained its autonomy; it has its duly constituted and acting board of directors, ready, able, and competent to conduct its affairs; said board of directors and all of the shareholders of said bank other than Thomas is and are in full accord with this affiant, and said board is acting in full concert with this affiant in his efforts in the premises to protect the bank and its said judgment, and in recognition of the fact that Stateler is devoted to Thomas, ready and willing to aid him in concealing his property, and that in his entire conduct Stateler has been and is adversary to the bank and friendly with Thomas.

That said corporation, through its board of directors, about November 1st, 1895, formally notified Stateler that the corporation repudiates him as its agent, disclaims him as such, denies that he has any right to or does represent it, and ordered him to desist from claiming to be such and from all interference with its affairs, but he persists in his said claim to be agent for the bank which repudi-

ates him, and on his claim to be its agent he does all in his power against said corporation and in favor of its adversary, Thomas, in the matter of its said judgment.

Individually the shareholders of said corporation also repudiate said Stateler as their agent, desire him to cease meddling with
147 their affairs, and they all (except Thomas) fully approve of the conduct of affiant in and throughout his administration of his trust in and through the San Francisco superior court suit and in the insolvency procedure at Alameda county; certain of them have given their affidavits in the procedure hitherto showing such approval of affiant and his conduct; said last-mentioned affidavits are nearly identical and one of them is hereto annexed, marked "Exhibit D," and made a part hereof.

Throughout the time involved in the attempts hitherto made to subject Thomas' assets to said judgment by the corporation, its board of directors, and its shareholders other than Thomas it has been and it is now most earnestly contended, and as this affiant is informed and believes and therefore alleges, the "Standard Soap Company" is but in name a corporation; that in fact said Standard Soap Company is Thomas and Thomas is the Standard Soap Company, to all practical purposes; that its purported capital consists of 10,000 shares, of which Thomas has about 9,688, Dowling 309, Parker 1, Perkins 1, and Boynton 1, the last three above mentioned really belonging to Thomas, but by him loaned to and put in the names of Parker, Perkins, and Boynton to enable them as shareholders to be directors; that of said pretended corporation said Thomas is and for at least twenty years has been president, business manager, and absolute dictator of its business and over its property he has exercised absolute control, drawing and using its funds as he chose in his private personal affairs and consulting neither the board of directors nor any one else in the prem-
148 ises; no dividends of profits have been made for many years or at any time within the dates herein mentioned, and Thomas has taken to and for himself all the profits of the business. There neither has been for years nor is there now any real corporation in the premises. The Standard Soap Company is but a business name for Thomas and he is the entire owner thereof except as to the small fraction or interest corresponding to Dowling's small block of stock.

As is hereinbefore recited, when Thomas first realized that he was liable to the bank for the losses resultant from his carelessness he attempted the fraud upon his anticipated creditor of hiding his property in the name of the said Standard Soap Company by transferring his stock, without consideration, to Pohle. This affiant on information and belief alleges was by Thomas done as follows, to wit:

Having (when he desired the apparent transfer to Pohle) entire control of the stock books of the so-called corporation, Thomas caused issuance of certificates to Pohle, took them to him, had him endorse and return them to Thomas with proxy to vote and power of attorney to sell or receive dividends on the stock, and Pohle's

functions were accomplished without his having any power in the premises, as Thomas held the stock certificates endorsed by Pohle, and the latter was powerless to sell without some sort of suit, wherein, the nature of the transaction being shown, he could obtain no benefit, being *in pari delictu* with the party against whom such action was brought and it being to enforce an illegal transaction.

149 Thomas kept the stock certificates and was reasonably safe against both Pohle and his creditors so long as none of them knew of the fraud and refrained from attacking the transfer, seeming validity of which appeared by the stock books showing it to stand in Pohle's name.

In Thomas' examination, however, under oath in the insolvency procedure he was between two fires. If he swore too strong as to the consideration and good faith of the transaction with Pohle, he put himself in his power, while, if weak in this showing, he not only got into the power of the assignee, but convicted himself of perjury in having sworn in his insolvency petition that in his inventory thereto he had included all of his assets when he had therefrom purposely left out this ownership by him of nearly all the stock of the Standard Soap Company and resultant ownership of its property, worth about $100,000.

There was no help for him, no means to escape from this dilemma which threatened his property and freedom from criminal procedure on the charge of perjury, but for his agent, Stateler, to get such standing in the insolvency cause and court as should enable him to oust Chetwood from the assigneeship, substitute Stateler, and have the latter's aid to escape from the imminent danger in which he stood. Stateler accordingly filed in said insolvency cause and court his verified petition, alleging that he was agent for the bank (though his verified complaint herein shows that he did not become so, if at all, till two months later), and sought to make himself master of the

150 situation so as to release from the impending danger his principal, Thomas. The facts being by affidavits shown to the insolvency court, it being thereby warned of the true motive of Stateler to protect Thomas, his application was denied, the further examination of Thomas was continued, and that of his other fraudulent assignee of the bank stock, Dowling, was entered upon. Being defeated in his attempt to become assignee and so control the insolvency procedure as to avoid attack on Thomas and Dowling, their danger being imminent, Stateler filed his claim for $1,885 on a note, the makers of which were Thomas, one Trumbo, who is a very rich man, and another, whose financial standing is unknown to affiant, and thereupon Stateler, on his claim to be a creditor of Thomas, on a technical defect which claims to exist in Thomas' insolvency petition, appealed from the adjudication to the supreme court, insisted on a stay of all procedure, by certiorari proceedings prevented disclosure as to and appropriation of excess of value of the homestead over $5,000 on the bank's debt, procured from twelve to fifteen months of immunity to Thomas and Dowling, and to the former gave that additional time within which to hide his assets. The $1,885 note,

if a valid claim in favor of the bank against Thomas, is, as appears from Stateler's showing as to it, equally good as against Trumbo, who is abundantly able to pay it. There was no occasion or need of or possible benefit to the bank to be had through said appeal. Thomas could never get his discharge in face of perjury as to and concealment of assets, which had become so palpable as to be apparent to all concerned, and there was no possible motive for
151 said appeal other than thereby to relieve Thomas and Dowling from danger and enable the former to fully consummate the hiding of his property.

If, as a matter of fact, on Stateler's said appeal from the adjudication of insolvency Thomas had some attorney other than Mitchell appear for him and seemingly oppose Stateler in said appeal, it was but part of the conspiracy between Stateler and Thomas, and was meant only as a deceit on the appellate court. In all of the superior court insolvency procedure, the Thomas and Dowling examinations, Stateler's appeal, and throughout the entire matter said Mitchell and the attorney of record for Thomas acted in open, palpable, and entire concert and consultation such as usually marks the conduct of associate counsel.

On information and belief this affiant alleges that of each and all of the above-recited facts Stateler had full knowledge. His counsel at that time and herein, R. B. Mitchell, Esq., was Thomas' lawyer, under pay from him, ostensibly as attorney for the Standard Soap Company, which had no occasion for an attorney, and his said professional relation to Thomas being scarcely attempted to be hidden under the name of employment by that so-called corporation, which was and is nothing but Thomas and Dowling, as Stateler and his said counsel well know.

Shortly before affiant, under his trust for the bank with that corporation, began the Alameda county superior court suit by creditors' bill to protect Thomas' property from spoi*l*ation and
152 further concealment by him pending Stateler's appeal, a new complication threatened and still threatens Thomas through the death of his pretended assignee, Pohle, administration on his estate, and claim by the administrators thereof that said estate is in fact the owner of said Standard Soap Company stock. To avoid this claim Thomas, having in his possession the certificates of said stock which had been so as aforesaid and under his direction issued to Pohle and by Pohle endorsed, delivered them to his wife, Mrs. Jane W. Thomas, to hold for him, Richard P. Thomas, and she, the certificates being endorsed in his lifetime by Pohle, with Thomas' directions, to the person having in charge the stock books, had new certificates thereof issued to her and the old Pohle certificates cancelled.

But Thomas, being aware that this transfer or issuance of new stock to Mrs. Thomas was too glaringly fraudulent to serve materially or permanently in the premises, as this affiant is informed and believes, and on his said information and belief alleges, conceived of and was about to attempt carrying into effect a scheme to get rid of the said last impending danger to him by breaking up

the Standard Soap Company through pretended indebtedness, insolvency of said company, fictitious suits against it, and sales of its assets and business to third parties by him and for his own benefit. The facts of this situation becoming known to Thomas' creditor, the California National Bank of San Francisco, and this affiant, its special trustee in charge of said $139,738 judgment, they commenced the Alameda county superior court suit by creditors' bill to prevent such destruction of the Standard
153 Soap Company, conversion of its business and property, and further hiding of his assets by Thomas. Said suit on creditors' bill to protect Thomas' assets involved exposure of Stateler's complicity with Thomas—knowledge on the part of Stateler and his said counsel herein of the above-recited facts; that Thomas owned all of the 10,000 shares of the Standard Soap Company stock, except Dowling's 309 shares, and, apart from protection of Thomas, Stateler's own immunity from exposure demanded prompt stoppage of said suit, and this present action became a necessity to Stateler personally. Accordingly, on his own as well as Thomas' behalf, Stateler, as he always has done and as hereinbefore recited, promptly came to Thomas' aid by this present action, now before this honorable court, to stop all procedure interfering with, tending to expose and to thwart, Thomas' concealment of assets, he, Stateler, and his said counsel herein being fully aware of each and all of the facts hereinbefore recited, and that Thomas is the real owner of all of the stock of said Standard Soap Company except Dowling's 309 shares thereof.

As to the matter of Thomas' appeal from the $139,738 judgment mentioned in the complaint herein as Stateler's excuse for not trying to collect the same, the facts are these: In and throughout the trial of the action wherein that judgment was obtained Thomas was represented by able, zealous, and efficient counsel, who made all possible effort in his behalf. When said judgment was rendered no motion for new trial was made; neither bill of exceptions nor statement was prepared; no appeal was taken or prepared
154 for. To all intents, all hope of reversing the judgment was abandoned or was not entertained; nor was there anything whatever done till about seven months thereafter, June, 1895, after Stateler's appeal had been taken and when he needed excuse for taking it. Thomas' appeal was then taken, as this affiant verily believes, and therefore alleges, not because it had merit, but solely to give Stateler such excuse for his appeal and total failure ever to do anything to enforce or to aid in the enforcement of the bank's claim against Thomas.

In the pleadings in the said suit against Thomas the contract nature of his liability is averred with the greatest particularity. Pages of the by-laws of the bank were quoted, and the allegations of negligence were repeatedly coupled with the allegations that by reason of the neglect of the duties imposed by the by-law relating to the special duties of president and those imposed by the other by-law relating to the committee the specified losses to the bank occurred. Affiant avers that, under the decisions and authorities,

wherever the release of one tort-feasor has worked a release of the other it has been in cases of personal tort, independent of and in nowise arising out of contracts. This elementary principal- has been laid down by the supreme court of California and, affiant believes, in every other tribunal wherein the question has arisen. In his brief filed in the supreme court on the appeal from the said judgment against Thomas, counsel for affiant cited a host of State and Federal cases on the above elementary proposition, some of which went so far as to hold that such an action was precisely what
155 it was in the pleadings designated, a bill in equity for an accounting, and that from the nature of the case it could not possibly be regarded as an action of tort.

A copy of said brief of affiant was served on counsel for Stateler herein as well as on counsel for the appellant Thomas, and in the reply brief of said Thomas no attempt was made to reply to the cases cited by affiant on the tort theory and not a case was cited in opposition to affiant's said contention; and on information and belief affiant avers that the contention that the claim was one of tort cannot be in good faith, and that said appeal, like Stateler's other proceedings, was solely to afford Stateler an excuse for not acting against Thomas.

On information and belief this affiant alleges that when said Thomas' appeal was taken Stateler's said counsel herein was in Thomas' employ and pay under said pretext of being attorney for the Standard Soap Company, which was but Thomas under another name, and which had no occasion for an attorney; that, as Thomas' professional adviser, said counsel for Stateler herein instigated, advised, and aided Thomas to make his said appeal and professionally assisted therein and in effect conducted the same, though he had another lawyer appear as Thomas' attorney of record therein, all of which, as affiant is informed and believes, Stateler was and is aware of.

That, as affiant is informed and believes, and therefore alleges, there is no merit in Thomas' said appeal, nor is there probability
156 of the said judgment being reversed. At the trial of the cause before two learned jurists, in turn, the defendants were ably represented by skilled attorneys, to wit, Messrs. Mesick, Waters & Maxwell; Messrs. Mastick, Belcher & Mastick; H. D. Talcott, Esq., W. S. Goodfellow, Esq., and A. R. Cotton, Esq.

All conceivable legal objections were made, and, in this affiant's opinion and that of his counsel and of the two judges in turn, no legal objection to said judgment against Thomas existed.

Thomas' said appeal was on the judgment-roll alone; no issues of fact can be considered thereon. He filed no supersedeas bond, and this affiant verily believes the sole purpose had in taking said appeal was but to give Stateler a plausible excuse for his avoidance of and continuous vexatious opposition to protection of the bank's said judgment, and that the taking of said appeal was but part of the scheme to make delays wherein Thomas could complete concealment of his assets.

That as to claims to excessive compensation or threats of inces-

sant litigation ascribed in the complaint to affiant, this affiant never made them. When Stateler's appeal is decided the question of collection of Thomas' assets must revert to the insolvency court or to that having jurisdiction of the original trust suit where the judgment was obtained. Either of these tribunals in fixing counsel fees and other compensation must presumably act justly.

If complainant's fundamental theory that he is entitled to administer the entire business of the bank be correct, however,
157 he could not question his own capacity to arrange payment for services rendered by others to the corporation. If the board of directors if found to be the proper party to ultimately fix compensation, it is to be assumed that body also will do its duty.

Furthermore affiant avers that the compensation desired by him and to which the various stockholders and directors of the bank have acceded is a fixed one, unaffected by the future length or extent of the litigation by him instituted in behalf of the bank, and that affiant can therefore have absolutely no motive for prolonging said litigation, as charged in the complaint.

With regard to the allegation on pages 25–60 of the complaint that the question of collusion between Stateler and Thomas was in issue before the supreme court in the certiorari proceeding of Stateler against the superior court of Alameda county, and that said supreme court necessarily determined that complainant was the duly elected agent of the bank and was not acting in collusion with Thomas, affiant avers that the election of Stateler was not and could not be raised in said certiorari proceeding and could not be passed on by said supreme court; that the evidence of collusion between Stateler and Thomas had not at that time by any means reached its present proportions, but affiant did to some extent point out such evidence of collusion as then existed and drew attention to the fact that R. B. Mitchell, Esq., was openly acting as attorney of record for Stateler and Dowling, the tool and confederate of Thomas, at the same time.

That said supreme court did not in terms touch on said
158 charge of collusion, but in the latter part of its opinion, 107 Cal., at page 540, expressly recognized affiant and not Stateler as the proper person to protect said judgment, and indicated the exact method for him to follow, which method was by the creditors' bill suit, which suit complainant has in this Federal court restrained affiant from prosecuting.

That, as already stated, the only place where complainant ever contested affiant's right to protect said judgment was in the superior court of Alameda county, which court decided against his right to do so, and by taking no appeal from said court and coming into this court and claiming the right to protect said judgment complainant is seeking here to review the decision of a State court.

And as to all the charges and insinuations of affiant's bad faith or misconduct or concealment not already answered affiant utterly denies each and all of said charges and insinuations, and affiant avers that he has at all times in administering his trust and in all

suits and proceedings in its behalf acted with the utmost possible fairness and good faith and is ready to explain to this or any court every single step taken by him in administrating said trust.

That in the suit of "The California National Bank of San Francisco *et al. vs.* Stateler," in this court, affiant has answered in detail every charge and accusation made herein against him, and, in revamping the same, affiant avers on information and belief that complainant's only motive can be to obscure the real issue and to place affiant in the same position of hostility to his trust which complainant herein is necessarily and unavoidably charged with occupying.

159 Affiant further avers on information and belief that at the very time complainant ventured to bring this suit, in addition to the bank stock taken from Parker and concealed by his attorney for Thomas, as already set forth, said Stateler personally or by his said attorney had the custody and control of nearly all of the stock of the Standard Soap Company, and that said attorney advised Thomas to transfer said stock on the books of said company to his wife in order to escape affiant's said judgment, and that said transfer to Mrs. Thomas was so made for said purpose.

That the true nature of the Alameda county superior court suit, the said "creditors' bill," to enjoin which this present action was brought, is best shown by the record therein. Accordingly a full copy of said record is hereto attached, marked "Exhibit E," and made a part hereof.

JOHN CHETWOOD, JR.

Subscribed and sworn to before me this 31 day of January, 1890.

GEO. T. KNOX,
Notary Public.

[NOTARIAL SEAL.]

160 "EXHIBIT 6" (Continued).

In the United States Circuit Court, Ninth Circuit, Northern District of California.

T. K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Respondents.
No. 12155.

Additional Affidavit on Respondents' Return to the Order to Show Cause Why an Injunction Should Not Issue.

UNITED STATES OF AMERICA,
Northern District of California, } *ss:*

A. W. Thompson, being sworn, deposes and says that he is an attorney of this honorable court and of all the courts of the State of California.

That throughout all of the litigation mentioned in the bill of complaint herein he has been and he still is the attorney for John

Chetwood, Jr.; that with said Chetwood affiant was in attendance on the insolvency court in Oakland at, upon, and in all the matters and procedure mentioned in said complaint and in the foregoing affidavit of Chetwood.

In and by the examinations in said insolvency cause it was shown that the alleged insolvent, Richard P. Thomas, attempting to hide his property, had put 1,020 shares of stock of the California
161 National Bank of San Francisco into the hands of a convenient friend, D. E. Dowling, to be by him concealed till Thomas should get his insolvency discharge. The said examinations were developing great danger to Thomas and Dowling, the latter having been cited to appear before said insolvency court to show cause why he should not be punished for contempt in disobeying its order to deliver said stock to the assignee in insolvency.

Thereupon Thomas K. Stateler, complainant in this present action, appeared, by his attorney, R. B. Mitchell, Esq., who was also Dowling's attorney in the premises, and, to aid Thomas and to protect Dowling and stop the examinations, Stateler filed a $1,885 claim in the insolvency procedure to give him a standing in said insolvency cause and court, and he thereupon made his appeal from the adjudication in insolvency, as was entirely patent, solely to get Thomas and Dowling out of danger. At one of the hearings of this insolvency-examination procedure in the superior court room, in Oakland, Alameda county, in the morning, before opening of court, on a date which affiant cannot more precisely fix than that it was before the $1,885 claim was filed, said attorney, R. B. Mitchell, Esq., approached this affiant and, on behalf of Thomas, requested that Chetwood dismiss Thomas' insolvency procedure or consent to such dismissal, saying that Thomas and his former attorney, who countenanced the insolvency procedure, were foolish in adopting it; that it was more dangerous to Thomas than to have fought the judgment on proceedings supplementary to execution, or words to that effect, and that now that Mitchell was in the matter
162 there would be no more foolishness, or language to that effect. Chetwood approaching, Mitchell continued his conversation and proposition. Affiant and his said client, Chetwood, declined to accede to said request, and thereupon the $1,885 claim by Stateler was filed and his appeal from the order of adjudication of insolvency was perfected evidently in the same connection as that of and with Mitchell's request that we should consent to a dismissal of the insolvency procedure, and clearly and manifestly to force a dismissal of said insolvency procedure because it had evidently failed of its purpose to serve Thomas in hiding his property and evade the bank's judgment, and had, moreover, become dangerous to Thomas and Dowling.

That, by said attorney of Stateler and Dowling, there was, in said conversation, no pretence at concealment of the fact that in and upon said matters, after commencement of the examinations in the insolvency court, he has really been and is attorney for Thomas as well as for Dowling and Stateler, and as such attorney he has in the hearing of affiant boasted that had he sooner been Thomas' attor-

ney in the original suit no judgment would have been obtained against him in favor of the bank, and at the said examinations before the insolvency court he was in constant, open consultation and concert of action with Thomas' attorney of record therein, T. C. Kierulff, Esq., and between him and Thomas' said attorney of record there was entire unanimity of argument and procedure and legal theories and objections such as usually characterize as-
163 sociate counsel in the trial of a cause.

A. W. THOMPSON.

Subscribed and sworn to before me this 31st day of January, 1896.

GEO. T. KNOX,
[NOTARIAL SEAL.] *Notary Public.*

164 "EXHIBIT 6" (Continued).

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK *et al.*, Respondents.

Return to Order to Show Cause.

Now come respondents and in response to the order to show cause herein present the following additional affidavit:

UNITED STATES OF AMERICA,
Northern District of California, } *ss.*

W. C. Glass, being duly sworn, deposes and says that for about twenty-one years last past prior to the month of September, 1895, he was in the employ nominally of the so-called corporation The Standard Soap Company, but said employ for about fifteen years continuously has really been the employ of R. P. Thomas, who is and throughout said fifteen years has been in effect that company, and affiant well knows the manner in which was controlled the business carried on under the name of said company.

That in the year 1888 Thomas, in said business, under the name of said company, had become largely indebted to this affiant for services and labor and in payment and settlement thereof induced affiant to accept 308 shares of the stock of said so-called corpora-
tion.
165 That in fact there was no real corporation in the premises, but it was a mere form by which Thomas avoided the appearance of ownership while he drew out the greater part of the profits of the business.

That on the acceptance by affiant of said stock four persons, R. P. Thomas, D. E. Dowling, E. B. Cooper, and affiant, became owners and partners in said business under the firm name of the Standard

Soap Company, Thomas having an interest therein equivalent to $\frac{9376}{10000}$; Dowling, $\frac{309}{10000}$; Cooper, $\frac{6}{10000}$, and affiant, $\frac{309}{10000}$; but for convenience and to enable Thomas to keep his ownership concealed the form of a corporation was maintained, Thomas loaning one share each to enough other persons to make up a board of directors and the usual corporation books being kept; Thomas always held the position of president of the company and always had entire, absolute, and unqualified charge and control of the property and business without advice or direction of the board of directors even in the most important matters, and said board was made up of employees in the business, whose employment or discharge was entirely in the hands of Thomas. For reasons of his own, Thomas, at a date which affiant cannot with precision fix, saw fit to conceal his ownership of interest in the company, putting all his stock but five shares and enough to qualify directors into the name of one J. G. Pohle, but the certificates of stock put in Pohle's name were, as affiant is informed and believes and on his said information and belief alleges, endorsed by Pohle and always kept under the control
166 or within reach of Thomas; and affiant, from his familiarity with the business and employees, has good reason to believe and does believe that the certificates of said stock so put in Pohle's name have been within two years last past entrusted by Thomas to one Eggleston, who claimed to be at one time agent of the shareholders of the California National bank, and were afterwards placed in the custody of T. K. Stateler, who now claims to be the agent of said shareholders, and in this connection affiant avers that 1,020 shares of stock of the said bank, which said shares were held by the superior court of Alameda county to be the property of John Chetwood, Jr., assignee of Thomas, *was* by one D. F. Parker placed in the hands of R. B. Mitchell, Esq., attorney for Stateler, in the month of June, 1895, on the order of said Thomas; said Mitchell, to the knowledge of affiant, has also been acting for a considerable time as the attorney of said Thomas; that at the time wherein, as already set forth, affiant was induced to sell his stock in the company to Thomas, in all negotiations concerning the sale said Mitchell acted for and represented said Thomas, and affiant avers that it is well known to various employees of said company that said Mitchell is and for a long time past has been acting as the counselor and adviser of said Thomas.

That with regard to the stock which was placed, as aforesaid, by said Thomas in the name of said Pohle and which this affiant has always understood and believes belonged to and was the property of said Thomas, this affiant avers that he is most credibly
167 informed and believes, and on his said information and belief alleges, said stock of the Standard Soap Company has been very recently transferred into the name of Jane W. Thomas, wife of said R. P. Thomas, and now stands in her name on the books of the company.

Affiant further avers that in the month of December, 1895, Thomas was negotiating to sell all his interest in said company for the purpose of evading payment of his debts, and particularly to

avoid payment of a certain judgment of about $200,000 obtained for the benefit of the stockholders of the California National bank by one John Chetwood, Jr.; that said Thomas would in all probability have effected said sale at the very low figure of $125,000, but for a restraining order forbidding said sale, issued by the superior court of Alameda county at the instance of said John Chetwood, Jr., trustee of said stockholders.

That said Thomas has also been planning to force the company into insolvency for the purpose, as affiant is informed and believes, of getting control thereof and evading said judgment creditor in the event of failing to sell out his interest in said company; that in the month of October, 1895, the business of said company was extremely prosperous, and it was and theretofore had been earning large profits, but in said month, for the aforesaid purpose, as affiant is informed and believes, of forcing said company into insolvency, said Thomas suddenly and entirely changed the methods of the business, and forthwith and as a result of said change the receipts of the business greatly diminished and are continuing to diminish.

168 If said change of methods is continued and the business is conducted on Thomas' present system, affiant verily believes that the value thereof to all persons concerned will be very greatly and permanently reduced; and affiant is informed and believes that the aforesaid judgment creditors of said Thomas have brought a restraining suit against said Thomas and said company for the express purpose of preventing the injury and wreck of the business of said company or the sale thereof by Thomas.

That in the matter of employment of Mitchell by Thomas, and as an incident thereto, affiant on information and belief avers that about the month of ——, 1895, Thomas, having occasion to pay Mitchell $1,000 for professional services and being short of cash, applied to D. F. Parker, secretary of the Standard Soap Company, for part of said sum, but Parker objected to the use of what were ostensibly funds of a corporation in his hands, as its secretary, in Thomas' private business, and accordingly refused him the money. Thereupon Thomas, conceding that payment of Mitchell was his personal affair, borrowed $700 of the company, giving his note therefor, of his own funds made up $300, and with the $700 borrowed of the company made up and paid the $1,000 to Mitchell, who, as affiant is informed and believes, was fully informed how said money had been borrowed and said $1,000 made up by Thomas.

Further in said behalf this affiant alleges that after having been induced by Thomas to take 308 shares of the stock in settle-
169 ment of his old claim, this affiant each year and repeatedly pressed Thomas and urged him to make, by dividends or otherwise, such division of profits of the business as would give to affiant his share thereof; but Thomas always on various pretexts avoided doing so, taking them all substantially to himself, to the great discontent of affiant, who constantly complained thereof to Thomas, until about September, 1895, Thomas, to stop his com-

plaints, proposed to buy of affiant his said shares of stock. Negotiations as to such sale were entered upon; but affiant and Thomas being unable to agree, Thomas sent affiant to his lawyer, Mitchell, who was authorized to act for him. Accordingly affiant went to Mitchell, who, being by Thomas advised, bid affiant's price down to much less than the real value of the stock and for Thomas closed negotiations with affiant and made the purchase for him, Thomas. Thomas did not wish the sale made directly to him or the stock to appear in his name, and the transfer, as affiant believes, was made to the company.

In the matter of Thomas taking to himself directly and without form of dividends the profits on said business, affiant, from his acquaintance with the business and conversation with other employees therein, has become well informed in the premises, and he is credibly informed and he believes, and on his said information and belief alleges, that within three years prior to September, 1895, Thomas of and from the said business and its profits has drawn and appropriated to himself large amounts of money, aggregating about
$65,000, and to provide for further like drafts on the funds
170 and profits of said business has caused to be made by employees of said company in its name a promissory note to Thomas for another large amount, to wit, about $60,000; which said note was and is, as affiant is informed and believes, wholly without consideration.

WM. C. GLASS.

Subscribed and sworn to before me this 31st day of January, 1896.

GEO. T. KNOX,
Notary Public.

[NOTARIAL SEAL.]

171 "EXHIBIT 7."

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Defendants.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

Thomas K. Stateler, being duly sworn, deposes and says that he is the complainant in the above-entitled action; that he has read the affidavit of the defendant John Chetwood, Jr., filed herein in response to the order to show cause why the defendant should not be enjoined pending this suit from the commission of the acts complained of in the bill, and in response to so much of said affidavit as he is advised may be material on the hearing of said order to show cause sets forth and avers as follows:

That he has nothing whatever to do with any disagreements or differences which may now exist or which have heretofore
172 existed between the defendant John Chetwood, Jr., and Richard P. Thomas; that the allegations contained in said affidavit of the said John Chetwood, Jr., to the effect that the affiant has entered into a combination with the said Richard P. Thomas to become the agent of the California National bank and its shareholders, or that he is now or ever has been acting in collusion with the said Richard P. Thomas in any way, shape, manner, or form, is absolutely false, and known to the said Chetwood, Jr., to be false at the time he made said affidavit, and made out of pure malice for the purpose of enabling the said Chetwood to cover up the true facts and issues in this case and to obtain control of the assets of the bank, particularly the judgment recovered for the bank against said Thomas, to the end that he, the said Chetwood, may compound and compromise said judgment for a small sum of money, and either apply the proceeds in satisfaction of fictitious claims for disbursements and counsel fees, which the said Chetwood claims to have incurred in carrying on this litigation and opposing affiant in the discharge of the duties of his office, or for the purpose of appropriating the proceeds to his own use. Affiant avers that all the allegations and charges in said affidavit reflecting in any way on the character of this affiant are each and all absolutely false, and known to the said Chetwood to be false at the time he made said affidavit, and made out of pure malice, and in this behalf affiant avers that he has been a resident and citizen of this community for many years, and has continuously occupied positions of trust in
173 this community, and at present is the general agent of the passenger department of the Northern Pacific railroad, with his office at No. 638 Market street, San Francisco; that he did not seek the position as agent of said corporation, but, having been elected by the majority vote of the capital stock of said bank, accepted the position with its legal fees and emoluments, and has ever since endeavored to perform the duties of his office, but that at every step he has taken to protect the assets of this association or to wind up the affairs of this bank he has been impeded, harassed, and annoyed by the said Chetwood, and lately by the board of directors of this corporation, over which the said Chetwood has obtained control.

That it is not true as set forth in the affidavit of the said Chetwood that the cause was dismissed as to Thompson and Wilson for any other reason than that the said Chetwood saw an opportunity to procure a large sum of money for alleged expenses and disbursements and attorney fees. The court had already rendered its decision in the case when the cause was dismissed as to Thompson and Wilson. They were held equally liable with Thomas for the amounts lost to the bank through the loans of the cashier. They were all three adjudged to be joint tort-feasors, and in this connection affiant submits the decision of the court awarding the judgment for the corporation against all three of them, and which said

decision is hereto annexed, marked Exhibit "A," and hereby made a part hereof.

174 Denies that the legal title to the judgment recovered by the said Chetwood for the benefit of the bank is now or ever has been in the said Chetwood as trustee or otherwise, but affiant avers that upon the rendition of this judgment by the superior court of the city and county of San Francisco, as set forth in his bill of complaint herein, the right to collect said judgment devolved upon the receiver of the association, and that upon affiant's qualifying as agent under the act of Congress set out in said bill the right to collect said judgment devolved upon affiant, the right to collect, however, being suspended by the order of the superior court of Alameda county adjudging Thomas an insolvent and staying all proceedings against him, and that no right of action can now be enforced on said judgment unless the supreme court sustains affiant's appeal taken from the order adjudicating the said Thomas insolvent, referred to in the bill, and sets aside the insolvency proceedings, in which event the right of action on said judgment would at once accrue to affiant; that the suit brought by said Chetwood was a stockholders' suit, as is fully set out in said bill; that the right of a stockholder to control said suit under the laws of the State of California, as affiant is informed and believes, and therefore avers, terminated with the rendition of the judgment therein, and that from and after the rendition of the said judgment the said Chetwood has never had any right to collect said judgment or to bring any suit in aid of said collection.

175 Affiant denies that at the time the bank suspended the said Richard P. Thomas had standing in his own name only 400 shares of stock, as set forth on page 19 of said defendant's affidavit, but, on the contrary, affiant avers that at the time the bank suspended the books of the bank now in the possession of affiant showed that there *was* outstanding issued to R. P. Thomas certificates of stock representing 960 shares; that on the day the bank failed the said R. P. Thomas surrendered a certificate for 500 shares of the capital stock of said bank and 2 new certificates were issued in the place thereof, one to the said R. P. Thomas for 375 shares and the other to the Security savings bank for 125 shares; that on January 5, 1889, the said Security savings bank surrendered said certificate for 125 shares and turned the same in for cancellation in favor of R. P. Thomas and at the same time other stockholders in said corporation representing 405 shares turned their certificates in for cancellation in favor of R. P. Thomas; and thereupon and on said last-named date it appears from the books of said bank that a certificate for 530 shares was issued to the said R. P. Thomas and on the same day certificates of stock in the names of other stockholders numbering 60 shares, belonging to other stockholders of said bank, were turned in for cancellation in favor of William C. Glass, Joseph Perkins, Leon Golly, R. W. Andrews, J. G. Pohli, and D. E. Dowling, and certificates of stock were thereupon issued to said six named persons, as requested by the holders of said original certificates at the time the same were turned in for cancellation, for

10 shares each; and affiant avers that said transfers under date of January 5, 1889, as appears upon the books of said corpora-
176 tion, were made under and by the consent of the examiners who were then in charge of the bank under the Comptroller of the Currency, and were made under and by the consent of said Comptroller of the Currency of the United States. Affiant denies that of the 530 shares of stock so transferred, as aforesaid, on the 5th day of January, 1889, to the said Richard P. Thomas and the said 60 shares so transferred on said date to the six parties above named the assessment levied by the Comptroller of the Currency upon the personal liability of the stockholders was only paid partly as to 80 shares thereof, and that of the remaining 450 shares no assessment was ever paid at all, but, on the contrary, affiant avers that the holders of said certificates paid to the receiver various sums of money on account of said call from time to time, but did not pay the full amount of said call for the reason that prior to the full payment thereof the receiver had obtained sufficient moneys to pay off the debts of the bank, and that no further sums were required; and affiant avers that no assessment was ever levied upon the stock of said association, and that none of the stock after the failure of the bank, as affiant is informed and believes, was liable for the debts of the bank, but that said stock under the United States national banking laws passed by delivery free and clear of any lien for any assessment theretofore levied by the Comptroller of the Currency against the personal liability of the holders thereof.

Affiant denies that at the meeting at which he was elected agent any of the shareholders protested against his election except
177 John Chetwood, Jr., whose protest appears in the minutes of said meeting, a copy of which is attached to affiant's bill of complaint. Affiant avers that all the stock that was voted for him as agent at the meeting at which he was elected was either voted by the person in whose name the stock stood upon the books of the bank at the date of the election or *were* voted by a representative of such party, accompanied with a good and sufficient proxy, under a resolution passed at said meeting permitting said proxies to vote.

That it is not true, as set forth in the affidavit of said John Chetwood, that the allowances made by the superior court for counsel fees in the suit in which the judgment was recovered against Thomas were made direct to the attorneys for Chetwood, but, on the contrary, the orders making said allowances ordered the moneys paid directly to the said Chetwood. Affiant denies that the superior court of San Francisco ever made any order in the suit brought by said Chetwood that the latter should be allowed to collect the judgment or any part thereof recovered in said action.

Affiant denies that he ever entered into any scheme with R. P. Thomas whereby affiant was to be elected agent of said bank, and denies that he procured from the comptroller and receiver the conveyance referred to for the purpose of protecting the said Thomas in the insolvency proceedings; denies that in the superior court of San Francisco or in the superior court of Alameda county in any

of the cases or proceedings referred to in the affidavit of the said John Chetwood, Jr., or in any other courts or in any other proceedings, the said Chetwood or any one else showed that the
178 affiant was the agent of Thomas or that he was engaged in assisting Thomas to conceal his property. Affiant denies that he filed the claim of the bank on the promissory note mentioned in the bill in the insolvency proceedings of R. P. Thomas in the superior court of Alameda county, or that he appealed from the judgment adjudging the said Thomas insolvent for the purpose of assisting said Thomas or for any other reason than for the purpose of protecting the interests of the bank. Affiant denies that the superior court of Alameda county refused to give him control of the judgment recovered for the bank against the said Thomas, for the reason that he, Stateler, was acting in bad faith, but that said matter was never passed upon by the court.

That at the time the court refused to remove said Chetwood as assignee affiant had not received his commission as agent from the comptroller, and he was, therefore, not the duly commissioned agent of the bank. Affiant denies that he has ever acted in the interest of Thomas or adverse to the bank and its shareholders. Affiant denies that this suit is not brought in good faith, but, on the contrary, avers that it is brought in the best of faith to protect the assets of the bank.

That, as to the allegation in the affidavit of the said John Chetwood that if affiant had not appealed from the order adjudging Thomas insolvent the said Thomas would have long since turned over to the said Chetwood enough property to satisfy the judgment recovered for the benefit of the bank, affiant avers that no property whatever belonging to the said Richard P. Thomas has ever been discovered by the said John Chetwood, Jr.; that the land referred to as having been dis-
179 covered by the said John Chetwood, Jr., and as belonging to the said Thomas stands in the name of the Standard Soap Company, but at the time of the conveyance was a homestead, and was also subject to a mortgage for seven thousand and odd dollars; that it appears from the examination of Thomas in the insolvency court that the stock of the Standard soap works, which the said Chetwood claims belongs to the said Thomas, has not stood in the name of the said Thomas since the year 1889, and that certain stock of the California National bank, originally owned by Thomas, was by the said Thomas sold to one D. E. Dowling, who claims to own the same; that if there never had been any appeal from said insolvency proceedings suits would have had to be brought by the assignee against the various parties claiming to own the property in question, and in those proceedings, as affiant is informed and believes, the parties could have attacked collaterally the jurisdiction of the superior court in the insolvency proceedings, and that if Thomas has complied with the conditions of the insolvent act he is entitled to a discharge from the judgment, and the judgment and the note now held by the bank would have been good only so far as any property that could have been recovered from the assignees

and grantees would have gone to satisfy it; that if the supreme court sets aside the order of adjudication, as affiant is informed and believes, and therefore avers, that it must necessarily do, then the lien of the judgment attaches directly to the land in question, and no discharge from said judgment can be had by the said Thomas.

180 That affiant's appeal from the order of adjudication was heard in the supreme court on the 6th day of February, 1896, and affiant is informed and believes that the attorney for Richard P. Thomas, Mr. Thomas C. Kierulff, appeared in court, and in company with Mr. A. W. Thompson, the attorney for John Chetwood, Jr., opposed his said appeal, both of them claiming that the superior court had jurisdiction to make the order of adjudication. Affiant is informed that no decision has yet been rendered by the supreme court on his said appeal, but that the matter is now under advisement.

Affiant denies that he applied to the superior court of San Francisco to have turned over to him the balance of the $27,500 in order to protect Thomas, but endeavored to obtain control of it, and is now endeavoring to obtain control of it, so that it may be divided among the shareholders of the bank, as provided by law. Affiant denies that in said case it was ever found that he was acting in antagonism to the bank or in collusion with Thomas, but affiant avers that the court refused to make any finding whatever on the subject. Affiant denies that all the shareholders, except Thomas, are in accord with the said Chetwood and approve his conduct in the matter of the affairs of said bank, but, on the contrary, avers that said Chetwood represents a small minority of the stockholders only, whose aggregate holdings, as affiant is informed and believes, and therefore, avers, do not exceed 150 shares. Affiant denies that the said Chetwood is endeavoring to protect the interests of the bank, but, on the contrary, affiant verily believes that if the said Chetwood is

181 allowed to have control of the judgment recovered for the bank against Thomas that he will settle and compromise the same without consultation with any of the stockholders and against the express wish of the majority of the stockholders, and affiant is informed and believes, and upon such information and belief avers, that the said Chetwood has been for some time past endeavoring to compound and compromise the suit against the said Thomas; denies that the individual shareholders of the corporation repudiate affiant as agent.

Affiant denies that he knows that Thomas is the owner of the stock of the Standard Soap Company, except the 309 shares standing in the name of Dowling; but, on the contrary, avers that, so far as he has been able to make inquiries, it appears that Thomas has owned none of the stock of the company since 1889. Affiant denies that the stockholders of the bank have ever agreed to pay the said Chetwood any compensation whatever; that it is not true that affiant ever had any custody or control of the stock of the Standard soap works, and affiant avers that he never had a share of said stock in his possession.

T. K. STATELER.

Subscribed and sworn to before me this 12th day of February, 1896.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

182 "EXHIBIT 7" (Continued).

EXHIBIT "A."

In the Superior Court of the City and County of San Francisco, State of California.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK, RICHARD P. THOMAS, ROBERT R. THOMPSON, ROBERT A. WILSON, and S. P. YOUNG, Receiver, etc., Defendants.

I have given the testimony in this case careful consideration and devoted much time to an examination of the law applicable thereto, and have arrived at the conclusion that the plaintiff is entitled to a judgment in his favor against the defendants Thomas, Thompson, and Wilson; but I have grave doubts as to the liability of the defendants for any loss sustained by the bank prior to the report of the auditing committee in July or August, 1888.

I have nearly completed an opinion in writing, embodying in full the reasons which have led to the conclusion above stated; but
183 inasmuch as the evidence before me is very unsatisfactory, rendering it almost impossible for me to determine therefrom the amount for which judgment should be entered, it becomes necessary that a referee should be appointed to take proof and report to the court the actual loss to the bank and its shareholders resulting from the negligence of said defendants.

If counsel in the case will agree upon the referee the court will appoint such person; otherwise the court will designate a competent person to perform said duty. Should it be deemed necessary or advisable hereafter to file the opinion herein spoken of, containing a full review of the law and facts, such a course will be pursued.

It is but proper and just to the defendants to state that no claim was or is made by the plaintiff that said defendants or either of them were guilty of any fraud, collusion, or direct personal wrongdoing in their relations with said bank other than a want of proper supervision over its affairs and its cashier. Their personal integrity is not and has not been impeached in any manner, and there is no testimony in the case casting any imputation on the honesty and fair dealing of either of said defendants with the affairs of the bank. The sole and only ground upon which the liability of the defendants is claimed, and upon which ground only the court finds against the defendants, is that as officers of the bank and its executive committee they were derelict in not paying that care and attention to

and control over its affairs and its cashier as required of them by the by-laws of said bank, as well as the general law of the land, and which constitutes such negligence on their part as makes
184 them liable to the stockholders for the losses sustained by them.

It is also proper to state that the cashier, by reason of his office, was enabled to perpetrate frauds in making loans, buying drafts and exchange, and in other ways, to such an extent and under such circumstances that the bank was wrecked, and not only its deposits, but its entire capital, wiped out; yet I am satisfied that had the defendants exercised that care and vigilance as such executive committee which the law demands they could not only have discovered but prevented these frauds.

While I am convinced that the confidence reposed by the defendants in the cashier was misplaced and betrayed by him, yet the losses sustained by the bank were through his fraudulent transactions, and under the evidence the consequences of such fraudulent acts must fall upon the defendants.

April 27th, 1894.

D. J. MURPHY, *Judge.*

Endorsed: Filed April 27th, 1894. M. C. Haley, clerk, by Frank Norton, deputy clerk.

185 "EXHIBIT 7" (Continued).

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

T. K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, etc., *et al.*, Defendants.

NORTHERN DISTRICT OF CALIFORNIA, *City and County of San Francisco,* } ss:

Robert B. Mitchell, being duly sworn, deposes and says—

That he is a member of the firm of Pierson & Mitchell, attorneys-at-law, whose office is in the Mills building, in the city and county of San Francisco, State of California.

On the 5th day of March, 1895, his firm was retained by one D. E. Dowling to appear in the superior court of the county of Alameda in the matter of Richard P. Thomas, an insolvent debtor, as the attorneys for the said D. E. Dowling, upon an order to show cause why the said Dowling should not be adjudged guilty of contempt in disobeying an order theretofore made by said court, dated March 4, 1895.

186 That his firm accepted said employment, and affiant appeared, on the 7th day of March, 1895, upon the hearing of said order to show cause, and the hearing of the same was com-

menced and continued until March 11, on which said date the hearing was resumed and finished and the order to show cause was discharged.

That on the 18th day of March, 1895, a stipulation was made between the assignee or his attorneys and affiant's firm, as the attorneys for Dowling, continuing until March 27, 1895, the hearing of a citation for Dowling to appear and answer questions in said insolvency matter. Thereafter and on the 27th day of March, 1895, affiant appeared in said superior court of Alameda county and moved on behalf of said Dowling for an order staying all proceedings until the determination of the appeal taken to the supreme court by the complainant here, T. K. Stateler, from the order adjudicating the said Thomas insolvent, and which is hereinafter referred to; that thereupon the relation of attorney and client between affiant's firm and the said Dowling ceased.

On the 17th day of March, 1895, affiant's firm was retained by General Robert A. Friedrich, an attorney-at-law of this city, to assist him as associate counsel and attorneys for T. K. Stateler, the complainant, in his official capacity as the agent of the California National bank, and to advise and consult with him in reference to recovering the assets of said bank, and particularly a fund of money
which had been paid into the superior court of the city and
187 county of San Francisco in the case of John Chetwood, Jr.,
plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, by two of the defendants in said action, and which trust fund, affiant was then informed, was being used by the said Chetwood for attorneys' fees and court expenses.

Affiant's firm thereupon accepted said employment and ever since have been and now are, along with the said Robert A. Friedrich, attorneys and counsel for complainant, and as such represented him and do now represent him in the various proceedings which it has been necessary for him to bring or to appear in to protect the property of the bank.

Upon accepting the employment, one of the first propositions that arose was in reference to the status of the insolvency proceedings instituted by the said Richard P. Thomas in the superior court of Alameda county. Affiant made an examination of the proceedings there and came to the conclusion that none of the jurisdictional facts which the insolvent statute required should appear upon the face of the petition were shown to exist at the time the order of adjudication was made, and for that reason that the court did not have jurisdiction and the insolvency proceedings could be set aside and Thomas be prevented from obtaining a discharge from the judgment and note held by the bank against him, and affiant thereupon advised complainant to that effect, and that acting upon his advice the complainant became substituted for the receiver in a
suit then pending in the superior court of the city and county
188 of San Francisco, theretofore brought by the receiver against
Thomas and two other persons to recover a balance due for principal and interest upon a promissory note signed by Thomas and two other persons, the property of the bank; and thereafter

complainant filed his proof of debt on this claim in the insolvency proceedings and appealed from the order of adjudication to the supreme court; that said matter came up for hearing before the supreme court on the 6th day of February, 1896, and is now under advisement.

Affiant says that in taking said appeal Stateler acted in perfectly good faith under the advice of counsel and for the purpose of protecting the judgment and note held by the bank, and that if any doubt existed in affiant's mind before the argument in the supreme court as to the merit of said appeal, the argument dispelled all doubt in affiant's mind, and affiant verily believes that said appeal will be allowed and said insolvency proceedings will be set aside.

Affiant further says that he is not now and never has been, and that his firm is not now and never has been, the attorneys for the said Richard P. Thomas in the insolvency proceeding in the superior court of Alameda county or in the case of Chetwood against The California National Bank of San Francisco *et al.*, above referred to, either in the superior court or in the supreme court. Thomas C. Kierulff is now and ever since long prior to the taking of said appeal has been the attorney for Richard P. Thomas in the insolvency proceedings, and at the hearing of said appeal before the supreme court, on the 6th inst., the said T. C. Kierulff appeared, and, in company with the attorney for John Chetwood, Jr., made an
189 argument opposing the appeal and claimed that the superior court of Alameda county had jurisdiction over the insolvency proceedings. In the case of Chetwood *vs.* The California National Bank *et al.* H. D. Talcott was the attorney for the said Richard P. Thomas until the 15th day of June, 1895, when the said H. D. Talcott substituted J. A. Stephens as attorney for Richard P. Thomas, and affiant is informed, and therefore avers, that the said J. A. Stephens ever since has been the attorney for the said Richard P. Thomas in said action in said superior court and is his attorney in the supreme court. Affiant denies that he ever in any conversation with A. W. Thompson or John Chetwood, Jr., in the court-room of the superior court of Alameda county or anywhere else, approached the said Thompson and on behalf of Thomas or anybody else requested Chetwood to dismiss the insolvency proceedings, nor does affiant now understand how the said Chetwood could dismiss the insolvency proceedings, as the proceeding was a voluntary one on behalf of Richard P. Thomas; the decree of adjudication had been made, the creditors had met, and an assignee had been elected. Affiant did have a conversation there on the 7th day of March, 1895, at the time that affiant's firm represented the said D. E. Dowling, as aforesaid, in which conversation affiant did express the opinion that the superior court did not have jurisdiction to entertain the insolvency proceedings; that the statement in said Thompson's affidavit to the effect that Stateler's claim was filed and his appeal from said order of adjudication of insolvency perfected so as
190 to force a dismissal of the insolvency proceedings because it had failed to serve Thomas in hiding his property, is untrue.

Affiant further says that his firm and he individually, before the

formation of said firm, have been the attorneys for or against said Thomas in various suits and legal matters during the last ten years; that at the time the said Stateler retained said firm the said Richard P. Thomas was absent from the city and county of San Francisco and State of California, and did not return here until some time afterwards; that Thomas subsequently called upon affiant and wished to retain him as his attorney in the supreme court in the appeal from the judgment above mentioned. Affiant stated that his firm had accepted employment as attorneys for Stateler, the statutory agent, and refused employment on behalf of Thomas; that neither affiant nor his said firm have represented Thomas in any of the matters connected with the California National bank; that it is not true, as stated in the affidavit of John Chetwood, Jr., and W. C. Glass, that affiant ever received any stock of the California National bank from Parker or any one else for Richard P. Thomas; that there has up to this date never been any opposing interests between this complainant and D. E. Dowling that affiant is aware of; that it is not true that affiant or affiant's firm were retained as attorneys for the Standard Soap Co., in order that they might draw pay for the services rendered the said Richard P. Thomas; that neither affiant nor affiant's firm are the regular attorneys for the said Standard Soap Co.; that they have at various times performed legal services for said
191 Standard Soap Co. which had nothing whatever to do with the matters in controversy here, nor was this complainant in any way, shape, or form involved in them; that affiant's firm acted as the attorneys for the Standard Soap Co. in bringing about a setttlement between W. C. Glass and the company by which the company purchased the interest of Glass for the sum of $5,125; that neither affiant nor affiant's firm ever represented Richard P. Thomas in said transaction, and, as far as affiant is informed, the said Richard P. Thomas was only an officer of said corporation, and did not own any stock therein; that on the 21st day of August, 1894, the said Thomas and his wife executed to affiant's firm a mortgage on their homestead in Alameda county for the sum of $7,516.80, and that said mortgage was recorded on the 25th day of August, 1894, in volume 480 of mortgages, page 33, records of Alameda county; that said mortgage was executed to the members of affiant's firm in trust for a client of the firm in settlement of a suit in which affiant's firm had been the attorneys opposed to the said Richard P. Thomas and had nothing whatever to do in the most remote degree with the affairs of the California National bank; that the note which was secured by said mortgage was payable in installments of one thousand dollars, and that several installments were paid during the year 1895; that neither affiant or affiant's firm have been acting as attorneys for Thomas in any matter since their employment by this complainant as aforesaid, and they have not been connected as attorneys with the Standard Soap Co.
192 since the settlement of the claim of the said Glass as aforesaid.

In the suit brought against the Standard Soap Co. by Chetwood

and the bank affiant is informed that the defendants are represented by Mr. T. C. Van Ness.

R. B. MITCHELL.

Subscribed and sworn to before me this 14th day of February, 1896.

EUGENE W. LEVY,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

Served and filed Feb. 14, 1896.

193 "EXHIBIT 8."

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

An order having been heretofore duly given and made in the above-entitled action requiring the defendants to be and appear before this court at a day and hour therein specified and show cause, if any they have, why the said bank, its board of directors, officers, and employees, and the said John Chetwood, Jr., his agents and servants, and each and every of their said attorneys, solicitors, and counsellors, should not be restrained and enjoined pending the determination of this action from denying the rights of the complainant to the said office of agent of said banking association, and from denying his right as such agent to the exclusive control of the assets of said bank, and from commencing any further litigation against him as such agent, and from prosecuting and defending any actions theretofore brought by them or either of them against complainant as such agent touching his right to said office and touching
194 his exclusive right as such agent to collect the assets of said bank, except the suit now pending in this court brought by said defendants against the complainant on the 12th day of November, 1895, and which suit was by said order to show cause hereby exempted from the operation of any injunction that might thereafter be granted in this action, and further to show cause why said bank, its board of directors, officers, and employees, and the said Chetwood, his agents and servants, and each and every of their said attorneys, solicitors, and counsellors, should not be enjoined pending the determination of this action from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by an open account, note, bill, or judgment, and particularly from attempting in any manner to collect the judgment theretofore recovered for said bank against Richard P. Thomas, and from further prosecuting the suit brought by defendants in the superior court of Alameda county to place a receiver in

charge of the Standard Soap Company; and said order to show cause having been fully heard, Messrs. Pierson & Mitchell appearing as solicitors for the complainant and A. W. Thompson and John Chetwood, Jr., as solicitors for the defendants, and thereafter submitted to the court for decision, and the court being fully advised in the premises—

It is now ordered, adjudged, and decreed that until the further order of this court or of the judge thereof the defendants, The California National Bank of San Francisco, its directors, officers, and employees, and said John Chetwood, Jr., his agents, servants,
195 attorneys, solicitors, or any other representative, are hereby restrained and enjoined from commencing any further litigation against the complainant, as agent of said bank, and from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by open accounts, bills, notes, or judgments, or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the said bank, and from settling and allowing or attempting to settle or allow any attorneys' charges or any other fees, expenses, or costs growing out of or which it may be claimed grew out of any past litigation in this matter, and from in any way disposing of or encumbering any of the assets, money, or property of said bank; but the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the supreme court of the State of California or in this court.

Dated February 24, 1896.

JAS. H. BEATTY, *Judge.*

196 "EXHIBIT 9."

UNITED STATES OF AMERICA, } ss:
Northern District of California, }

Oscar Sutro, being duly sworn, deposes and says that he is now and at all the times hereinafter mentioned was a citizen of the United States over and above the age of twenty-one years and not a party to the above-entitled action.

That heretofore, to wit, on the 25th day of February, A. D. 1896, at the city and county of San Francisco, State of California, he personally served the injunction issued in the above-entitled action on the 24th day of February, 1896, a certified copy of which is hereto attached, upon the defendants in the above-entitled action by then and there delivering to John Chetwood, Jr., personally, and Charles H. Holt, the vice-president of the defendant The California National Bank of San Francisco, personally, a certified copy of said injunction.

OSCAR SUTRO.

Subscribed and sworn to before me this 26th day of February, 1896.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

197 "EXHIBIT 10."

United States Circuit Court, Ninth Circuit, Northern District of California.

T. K. STATELER, Complainant, *vs.* THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO and JOHN CHETWOOD, JR., Respondents.	Cause No. 12155.

Answer of Respondents to Complainant's Amended Bill of Complaint.

Now come the respondents, not waiving but insisting in the manifold defects of and in complainant's amended bill of complainant herein, — now unto said amended complainant make this their answer, to wit:

I.

These respondents on their information and belief deny that at the so-called shareholders' meeting, averred in said complaint to have been held, 1,020 shares of the stock of said banking association *was* represented or voted; deny that a majority of the stock of said association was at said meeting represented; deny that at said meeting a majority of the stock of said association was voted in any manner or at all.

II.

198 These respondents on their information and belief deny that shareholders of said defendant bank executed a bond for the discharge of his duty by complainant herein or at all in the premises.

III.

These respondents on their information and belief deny that the complainant herein ever became or was the agent of said banking association or of its shareholders under the act of Congress mentioned in said amended bill of complaint or at all.

IV.

These respondents deny that Richard P. Thomas, the person of that name mentioned in said bill of complaint, was at the time mentioned in said bill of complaint or at any time since then a man of doubtful means, and in that behalf these respondents on their information and belief aver that at the time mentioned in the said bill of complaint and at each and all of the dates therein mentioned said Richard P. Thomas was and still is a man of large financial means, fully able to pay all of the said judgment which was, as in said complaint mentioned, entered against him.

V.

These respondents deny that the respondent John Chetwood, Jr., or any one ever kept the matter of settlement with Thompson and Wilson or any of the proceedings in the suit in the superior — in any manner or at all secret or concealed from any one, and deny that there was any secrecy or concealment in the premises at all.

VI.

199 These respondents on their information and belief deny that for any of the moneys mentioned in said complaint herein allowed and paid unto John Chetwood, Jr., the said banking association has any valid or other legal claim against him, the said Chetwood.

VII.

These respondents as to the matter of the insolvency procedure of Richard P. Thomas and of the appeal therein aver that the supreme court of California on said appeal has affirmed the judgment of the superior court and held said appeal to have been without merit.

VIII.

These respondents, herein answering the averments of said bill of complaint referring to the application unto said supreme court for a writ of certiorari to review the action of the superior court of San Francisco in the matter of making allowances and payment of moneys unto John Chetwood, Jr., aver that said application has been fully determined by the said supreme court adversarily to the complainant and to his averments as to said orders of the superior court made in his said complaint herein.

IX.

These respondents deny that on the hearing of the certiorari proceedings before the supreme court in the superior court of Alameda county said supreme court in anywise or at all passed upon the validity of the election as agent of the complainant herein, and deny that in or upon the said certiorari proceeding or at all said supreme court held that said complainant herein was not
200 acting collusively with Thomas in the premises.

X.

These respondents deny that complainant has been hindered or delayed in the discharge of his duties by said Chetwood or at all; deny that complainant ever had any duties in the *in the* premises, and deny that he ever was agent for said banking association or for any one at all in the premises other than Richard P. Thomas.

XI.

These respondents deny that any of the doings, actions, litigations, or defenses to litigation by said Chetwood were in anywise

or at all by him instituted, prosecuted, or maintained for his own selfish ends or purposes or for any ends or purposes other than to protect said banking association and its shareholders.

XII.

These respondents deny that at the meeting of the board of directors of said association whereat the said Thomas was removed as president and Vanderslice was appointed in his place there was less than a quorum of said board in attendance, & aver, and so the facts are, that at said meeting there was present and voting a quorum of said board, and said removal of Thomas and election of Vanderslice to the presidency was regular and valid.

XIII.

These respondents deny that no legal defense can be made to the action in this court pending (cause No. 12161) by said Chet-
201 wood; aver, and so the facts are, that he has a full and valid defense thereto, which is by him duly pleaded in his verified answer therein.

XIV.

These respondents deny that there ever was or has been any intention, plan, scheme, or action towards any kind of compromise by said Chetwood or this corporation of the judgment and claim against Thomas, but, on the contrary, aver, and so the facts are, that all of the proceedings in the premises of and by said Chetwood and of the others respondent herein, said association, have been solely to collect said judgment for the benefit of said banking association.

XV.

Further answering and as a separate, distinct plea herein, these respondents aver, and so the facts are, that there is another action pending between the same parties hereunto which was begun before the present action was commenced, which is fully determinative of complainant's right to bring or in anywise or at all to maintain this action. The said prior action is cause No. 12140, in this same United States circuit court, ninth circuit, northern district of California, and is entitled The California National Bank of San Francisco and John Chetwood, Jr., complainants, *vs.* T. K. Stateler, respondent.

Said cause is brought for the express purpose of determining whether T. K. Stateler is or ever was agent of said association or of its shareholders under the act of Congress pleaded by complainant herein or at all; whether he has or ever had
202 any standing, in fact or in law, as such; whether he ever became such agent, and, if he did, then to remove him from the position of agent for good, legal, and sufficient causes and upon facts duly alleged against him in the bill of complaint in said cause No. 12140 in this court.

That in said previously commenced and now pending action,

cause No. 12140, the parties are precisely the same as herein, reversed, complainant herein being respondent therein and the respondent herein being the complainant -herein, and should such complainants in said first-begun action prevail therein, then and in such event this present action must forever end and be as though as never instituted.

Wherefore these respondents pray that this present action be stayed till the determination of said action No. 12140; that should that action be determined against complainant herein this action be dismissed, and that complainant take nothing for this action and that these respondents be hence dismissed with their costs.

JOHN CHETWOOD, JR.,
A. W. THOMPSON,
Solicitors for Respondents.

I hereby certify that I am one of the solicitors and of counsel for the respondents in the foregoing cause, and that, in my opinion, the foregoing plea is well founded in point of law.

A. W. THOMPSON,
Solicitor and of Counsel for Respondents.

203 UNITED STATES OF AMERICA, } ss:
Northern District of California, }

I, John Chetwood, Jr., being duly sworn, depose and say that I am one of the respondents herein; that I have read the foregoing plea and know the contents thereof, and the same is true, as I verily believe.

JOHN CHETWOOD, JR.

Subscribed and sworn to before me this 7th day of September, 1896.

[L. S.] N. E. W. SMITH, *N. P.*

UNITED STATES OF AMERICA, } ss:
Northern District of California, }

John Chetwood, Jr., being duly sworn, says that he is one of the respondents in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own personal knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN CHETWOOD, JR.

Subscribed and sworn to before me this 7th day of September, 1896.

[L. S.] N. E. W. SMITH, *N. P.*

I hereby certify that I am one of the solicitors for respondents in the foregoing cause, and that, in my opinion, the foregoing answer is well founded in point of law.

A. W. THOMPSON,
Solicitor and of Counsel for Respondents.

204 "EXHIBIT 11."

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

T. K. STATELER, Agent, &c., Complainant,
vs.
THE CALIFORNIA NATIONAL BANK *et al.*, Respondents.

NORTHERN DISTRICT OF CALIFORNIA,
City and County of San Francisco, } *ss:*

John Chetwood, Jr., being duly sworn, deposes & says—

That in an opinion rendered August 7th, 1896, the supreme court of the State of California rendered its decision in a case before it entitled "S. F. No. 266, John Chetwood, Jr., plaintiff & respondent, *vs.* The California National Bank of San Francisco *et al.*, defendants, T. K. Stateler, appellant;" that in deciding said case said supreme court adjudged & decreed that T. K. Stateler, appellant, was the *de facto* agent of the stockholders of said bank; that any alleged irregularity or illegality of his election as such agent could not be determined collaterally in said action, nor could said irregularity or illegality be determined save in a direct proceeding, and therefore the said Stateler was after the performance of certain other things entitled to the temporary, if not permanent, custody of certain funds & monies then under the care & control of the superior court of San Francisco.

205 That the other things referred to which said supreme court decreed should be performed before the custody of said funds was awarded to Stateler were the allowance by said superior court of San Francisco of a fair & reasonable amount as costs, disbursements, & attorneys' fees to affiant for services & expenditures made & rendered as referred to in the opinion of said supreme court.

That the language of the opinion of said supreme court in directing said allowance was as follows: "The stockholder who sues on behalf of the corporation is unquestionably entitled to conduct, manage, & control the litigation until a final determination thereof. Thereafter in the case of a corporation not under disability and where no good reason appears to the court why it should not be allowed to take into possession and dispose of the judgment recovered (Fox *vs.* Hale & Norcross, 108 Cal., 475) it becomes the duty of the shareholders, after reasonable allowance made for costs and expenses of litigation, to restore to the corporation the funds in his possession. * * * An end to that litigation"—referring to the litigation in the main case, in which the judgment against Thomas was ordered reversed—"having been thus reached, the agent was entitled to have the proceeds of it, after reasonable reductions, paid over to him. Such was his demand, & it should have been granted. The order is reversed, with directions to the trial court to enter the order prayed for after making reasonable allowance to plaintiff

Chetwood for his costs, disbursements, & attorneys' fees in the said action, as contemplated by law."

206 That subsequent to the filing of the remittitur from said supreme court in said cause to the superior court of San Francisco said T. K. Stateler applied to said superior court for the transfer to him of the said funds and monies in the care and control of said court, and thereupon your affiant, in order to follow the directions of the supreme court of California and to enable the same to be given full force and effect, applied to said superior court for the allowance of a fair and reasonable compensation by way of attorneys' fees for his services and for his costs and disbursements.

That when the application of said affiant came to a hearing in said superior court said T. K. Stateler objected to the hearing of said application and claimed that affiant was enjoined and restrained by a Federal court, to wit, by this hon. circuit court, from making his said application; that the case in which this honorable court did to some extent restrain & enjoin affiant from doing or attempting to do certain things is a case entitled T. K. Stateler, complainant, *vs.* The California National Bank & John Chetwood, Jr., defendants; that in said case and on the 24th day of February, 1896, this hon. court did in fact issue a certain restraining order directed against the defendants, and in said order are the following words and expressions:

"It is now ordered, adjudged, and decreed that until the further order of this court or of the judge thereof the defendants, The California National Bank of San Francisco, its directors, officers, and employees, and said John Chetwood, Jr., his agents, servants,

207 attorneys, solicitors, or any other representative, are hereby restrained and enjoined from commencing any further litigation against the complainant as agent of said bank, and from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by open accounts, bills, notes, judgments, or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of said bank, and from settling or allowing or attempting to settle or allow any attorneys' charges or any other fees, expenses, or costs growing out of or which it may be claimed grew out of any past litigation in this matter, and from in any way disposing of or encumbering any of the assets, money, or property of said bank, but the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the supreme court of California or in this court."

That under the terms and restrictions of the foregoing order said T. K. Stateler did then and there declare before said superior court that affiant was restrained and enjoined from making any application to said court for costs, disbursements, or fees; that, your affiant believed and considered and still believes and considers that his said application was clearly part and parcel of the final determination of one of the actions pending in the supreme court of California at the time of issue of the said injunction of this hon.

court, and that affiant's application was expressly exempted and excluded from the operation of said injunction; and affiant avers that under the decision of the supreme court of California the
208 superior court of San Francisco cannot obey the direction & decree of said supreme court and transfer the funds in its custody to said Stateler unless and until it make your affiant a fair and reasonable allowance for his costs, disbursements, and attorneys' fees, and that should said superior court find or hold itself unable to listen to your affiant's application it cannot make any transfer of said funds to Stateler and cannot obey the instructions of its appellate court, the said supreme court of California, and that said funds must remain tied up and undistributed for an indefinite period, to the great injury and prejudice of the persons entitled thereto, and that this peculiar and unexpected condition *condition* may ultimately lead to an inevitable and deplorable conflict between the State and Federal courts.

That at the hearing of affiant's application in said superior court affiant and his associate attorney herein were represented by E. G. Knapp, Esq., and by W. H. Metson, Esq., of the firm of Reddy, Campbell and Metson; that said Knapp and Metson then & there represented to said superior court that the construction which said Stateler attempted to put upon the restraining order of this hon. court was entirely unexpected by their clients, and that one of said attorneys had never before had his attention drawn to said restraining order and asked for a continuance of two weeks to afford an opportunity of looking into the matter, and thereupon the superior court of San Francisco granted said continuance, and suggested that the peculiar condition of affairs should be drawn to the attention of this hon. court, and that it might be desirable to ask that said
209 restraining order be modified or construed.

And in this connection your affiant avers that he and his associate counsel herein had had no intimation whatever until the proceedings in the San Francisco superior court above referred to that T. K. Stateler or his counsel herein considered or claimed that the injunction of this hon. court in any way interfered with the right or duty of affiant to present his said application to said superior court, and in presenting said application affiant acted in entire good faith and without the least intention of disobeying or evading any order of this court or of evincing or being charged with evincing the slightest disrespect to this court or its orders or proceedings in any particular.

JOHN CHETWOOD, JR.

Subscribed and sworn to before me this 6 day of Oct., 1896.

[L. S.] GEORGE T. KNOX,
Notary Public.

210 "EXHIBIT 11" (Continued).

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

T. K. STATELER, Agent, &c., Complainant,
vs.
THE CALIFORNIA NATIONAL BANK *et al.*, Respondents.
} Notice of Motion to Modify.

To T. K. Stateler, Esq., & Messrs. Pierson & Mitchell and Robert A. Friedrich, his solicitors:

You will please take notice that on Monday, Oct. 12, 1896, at 11 o'clock a. m., or as soon thereafter as the matter may be heard, respondents in the above-entitled action will apply to this court for an order modifying the injunction issued by and out of this court on the 24th day of February, 1896, to the extent & for the purpose of permitting & allowing either or both of respondents present & have settled & allowed in the proper & appropriate court or courts, and especially in the superior court of San Francisco & in the case there pending of John Chetwood, Jr., pl'ff, *vs.* The California National Bank of San Francisco *et al.*, def'ts, such costs, disbursements, commissions, attorney & counsel fees as said courts or any of them may deem proper and a fair & reasonable compensation for all services rendered by said respondents or either of them
211 in the litigation affecting the property & assets of the California National Bank of San Francisco. This motion will be made upon the papers & pleadings on file herein & upon the affidavit of John Chetwood, Jr., attached hereto.

A. W. THOMPSON &
JOHN CHETWOOD, JR.,
Solicitors for Respondents.

212 "EXHIBIT 12" (Continued).

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

T. K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and John Chetwood, Jr., Defendants.
} No. 12155.

Comes now T. K. Stateler, the complainant herein and the duly elected, commissioned, qualified, and acting agent, pursuant to the act of Congress in such case made and provided, of The California National Bank of San Francisco, one of the defendants herein, and herein and hereby opposes the motion of the defendants for an order modifying the injunction issued by and out of this court on the 24th day of February, 1896, and, in addition to the facts set up

in the supplemental complaint herein as having occurred since the issuance of the injunction sought to be modified and which, as he is advised, are material upon the hearing of this motion, sets forth and alleges as follows, to wit:

213 I.

That heretofore, to wit, on the 8th day of October, 1896, after a full hearing, the superior court of the county of Alameda, State of California, by its order, duly given and made, removed the defendant herein, John Chetwood, Jr., as the assignee of Richard P. Thomas, an insolvent debtor, the matter of his insolvency then pending before said superior court, on the ground, among others, that the said John Chetwood, Jr., had filed a fraudulent claim, amounting to $14,000, based upon an alleged indebtedness, which had no existence whatever, against the insolvent. A copy of the order so removing said assignee is hereto attached and made a part of this opposition.

II.

Affiant further says that upon the hearing of the application of John Chetwood, Jr., before the superior court of the city and county of San Francisco, State of California, on the 2nd day of October, 1896, in the suit of Chetwood *vs.* The California National Bank of San Francisco *et al.*, on his application to have an additional allowance made to him out of the funds of the bank on deposit in said court to the credit of said action for other counsel fees, costs, and disbursements, the court stated that it would make no allowance whatever out of said fund unless this hon. court permitted the same.

PIERSON & MITCHELL,
ROB'T A. FRIEDRICH,
Attorneys for T. K. Stateler, Complainant.

214 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

T. K. Stateler, being duly sworn, deposes and says that he is the complainant herein and the party presenting the foregoing opposition to the motion of defendants for a modification of the injunction issued herein on the 24th day of February, 1896; that he has read the foregoing opposition and knows the contents thereof, and the same are true of his own knowledge, except as to those matters therein stated on information and belief, and as to such matters he believes it to be true.

T. K. STATELER.

Subscribed and sworn to before me this 10th day of October, 1896.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

215 "EXHIBIT 12" (Continued).

In the Superior Court of the County of Alameda, State of California, Dep't 2.

In the Matter of R. P. THOMAS, an Insolvent Debtor. No. 10618.

It appearing that the above-named insolvent filed his petition herein in voluntary insolvency on the 10th day of December, 1894, pursuant to the provisions of the insolvent act of 1880, and that thereupon this court made its order adjudging said petitioner insolvent, staying all proceedings against him and appointing the 21st day of January, 1895, at 10 o'clock a. m., as the time and the court-room of this court the place for the creditors of said insolvent to meet and to prove their debts and to choose one or more assignees of said estate, and it further appearing that thereafter and on the said 21st day of January, 1895, said creditors' meeting was duly held, and that the only creditor present at said meeting was John Chetwood, Jr., who proved as a claim against said insolvent a judgment recovered by him in the superior court of the city and county of San Francisco, State of California, in an action entitled "John Chetwood, Jr., plaintiff, *vs.* The Cali-
216 fornia National Bank of San Francisco, a corporation, and Richard P. Thomas *et al.*, defendants," on the 20th day of November, 1894, for the sum of $139,419, with interest thereon at the rate of seven per cent. per annum from December 15, 1888, together with costs, taxed at $319.70, and which judgment was so, as aforesaid, recovered by said John Chetwood, Jr., in said action as a stockholder of and for the benefit of the defendant The California National Bank of San Francisco; and it further appearing that at said creditors' meeting the said John Chetwood, Jr., voted said claim in favor of himself as assignee, and thereby caused himself to be elected assignee of said insolvent, and that he thereupon qualified as such assignee and entered upon the performance of the duties of his office; and it further appearing that thereafter and on the 22nd day of July, 1896, said judgment was reversed by the supreme court of the State of California on an appeal by this insolvent, and that a judgment was ordered entered and was thereafter entered by the superior court of said city and county of San Francisco in said action in favor of this insolvent and against the said John Chetwood, Jr., for costs, and that by reason of the reversal of said judgment said claim no longer exists, and the same has been wholly extinguished; and it further appearing that the said assignee has not filed in this court any account whatever of his receipts and payments as such assignee, or any statement of the property of said insolvent outstanding, or any statement of the debts or claims proved against said insolvent; and it further appearing that more than one year has expired since the adjudication of insolv-
217 ency, and no extension of the time within which the assignee is to file said accounts and schedule has ever been granted by this court; and it further appearing that the said John Chetwood, Jr., has filed in this court a claim against said insolvent,

verified by his own oath, for the sum of $14,000, and that upon investigation of said claim the court has found that said claim is fraudulent, and that the said insolvent is not indebted to the said John Chetwood, Jr., thereon in any amount whatever, and good cause appearing therefor:

Now, therefore, it is by the court of its own motion ordered and adjudged that the said John Chetwood, Jr., be, and he is hereby, removed as assignee of the above-named insolvent.

Dated October 8th, 1896.

A. L. FRICK, *Judge.*

218 "EXHIBIT 13."

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Bank) and John Chetwood, Jr., Defendants. } No. 12155.

The defendants in the above-entitled action having duly served and filed their notice of motion to modify the injunction *pendente lite* heretofore and on the 24th day of February, 1896, issued herein so as to permit them to apply to the superior court of the city and county of San Francisco, State of California, in the action therein known as "John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants," and numbered 30052 on the files of said court, for an order allowing the said John Chetwood, Jr., defendant herein, plaintiff therein, out of the fund on deposit in said court to the credit of said action, belonging to the California National Bank of San Francisco, defendant herein and defendant in said action, a further sum of money for attor-
219 neys' and counsel fees, costs, disbursements, and commissions, the said notice of motion being accompanied by an affidavit of the defendant Chetwood, and said notice coming on this day regularly to be heard, John Chetwood, Jr., appearing *in propria persona*, in support of said motion, and Pierson & Mitchell, counsel for the complainant herein, Thomas K. Stateler, in opposition thereto, whereupon there is introduced in opposition to said motion on behalf of the complaina-t his affidavit, and said motion being fully heard and submitted and the court being fully advised in the premises:

It is now ordered that said motion be, and the same is hereby, denied.

Dated October 12, 1896.

WM. W. MORROW, *Judge.*

220 "EXHIBIT 14."

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

To the hon. the judges of the circuit court of the United States, ninth circuit in and for the northern district of California:

Thomas K. Stateler, a citizen and resident of the State of California and the complainant in the above-entitled action, brings this his supplemental bill of complaint, after leave of the court first had and obtained; and thereupon your orator avers and shows:

I.

That his bill of complaint herein was filed in this court on
221 the 4th day of January, 1896; that subsequently and on the 22nd day of July, 1896, the supreme court of the State of California, on the appeal taken by Richard P. Thomas from the judgment of the superior court of the city and county of San Francisco, State of California, entered in the action entitled "John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco (a corporation), Richard P. Thomas, Robert R. Thompson, Robert A. Wilson, and S. P. Young, receiver of said bank, defendants," and which said case is referred to in the bill of complaint filed herein, duly gave and rendered and caused to be entered its judgment reversing said judgment and ordering a judgment to be entered by said superior court in favor of the said appellant, Richard P. Thomas, and against the said respondent, John Chetwood, Jr.; and thereafter and on the 22nd day of August, 1896, said supreme court caused its remittitur to be duly issued to the clerk of said superior court; and thereafter and on said last-named date it was filed in the clerk's office in said superior court; that thereafter and on the 28th day of August, 1896, an order was duly given and made and entered by said superior court in said action, ordering a judgment to be entered in favor of the said Richard P. Thomas and against the said John Chetwood, Jr., for his costs on appeal, and on said last-named date a judgment was duly entered in said action in said superior court in favor of the said Richard P. Thomas and against the plaintiff John Chetwood, Jr., for his costs on appeal, amounting to the sum of $122.40, and that said judgment has never been set aside, but is now in full force and effect and wholly unpaid; that in and by the judgment so as aforesaid
222 given, rendered, and entered in said supreme court on the 22nd day of July, 1896, said supreme court decided that

the action of John Chetwood, Jr., plaintiff in said action and defendant in this action, in accepting $27,500 from the defendants in said action, Thompson and Wilson, and releasing them from their indebtedness to the bank, was in itself a release of the judgment theretofore rendered in said action against the said Richard P. Thomas; and your orator now avers that by reason of said action of the defendant John Chetwood, Jr., this bank has been deprived of its most valuable asset, to wit, the judgment so as aforesaid recovered by the said John Chetwood, Jr., in said action in said superior court against the defendant Richard P. Thomas for the sum of $139,419, with interest thereon at the rate of seven per cent. per annum from the 15th day of December, 1888, and costs, taxed at $319.70.

II.

Your orator further avers that subsequent to the filing of his original bill of complaint herein, and on the 7th day of August, 1896, the supreme court of the State of California duly gave and rendered and caused to be entered its judgment upon the appeal taken by your orator from the order of the superior court of the city and county of San Francisco, State of California, dated the 8th day of July, 1895, made in said cause of John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, refusing to turn over to your orator what remained of
223 the money so as aforesaid paid into said superior court by the defendants in said action, Thompson and Wilson, as a consideration for their being released from their indebtedness towards the defendant bank, wherein and whereby said supreme court duly adjudged that your orator was the duly elected, qualified, and acting agent of the California National Bank of San Francisco, pursuant to the act of Congress in such case made and provided and as recited in the original bill of complaint herein, and reversed the order of said superior court and ordered said fund to be delivered to him; that on the 4th day of September, 1896, an application made by the defendant Chetwood for a rehearing was denied by said supreme court, and on the 5th day of September said supreme court caused to be issued to the clerk of said superior court its remittitur, which was duly filed in said superior court on the 8th day of September, 1896, and spread on the minutes, as provided by law; that thereupon the said defendant here, John Chetwood, Jr., made an application to said superior court for an order making him a further allowance out of said fund of a sum sufficient to pay his counsel and attorneys' fees and certain costs, disbursements, and expenditures, which he claimed to have incurred in said action, in addition to the sums heretofore allowed him in said action, and which are set forth in full in the original bill of complaint herein, and a sum of money sufficient to cover such counsel and attorneys' fees, costs, disbursements, and expenditures as he might be called upon to incur or make hereafter in said suit, but that said application has not yet been acted upon.

224 Wherefore your orator prays for the relief herein specified in his original bill of complaint herein.

PIERSON & MITCHELL,
ROB'T A. FRIEDRICH,
Solicitors for Complainant.

R. B. MITCHELL, *Of Counsel.*

225 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Thomas K. Stateler, being duly sworn, deposes and says that he is the complainant in the within-entitled action; that he has read the foregoing supplemental bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein set forth upon information and belief, and as to such matters he believes it to be true.

T. K. STATELER.

Subscribed and sworn to before me this 30th day of September, 1896.

EUGENE W. LEVY,
[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

226 "EXHIBIT 15."

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Hon. James H. Beatty, judge.

T. K. STATELER
vs.
CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*

MONDAY, *February* 24, 1896.

The COURT (orally): This is a case which has given me more concern that such matters usually do, because it is somewhat complicated.

In the first place, this bank suspended operations, I believe, a number of years ago. Immediately after the suspension the Comptroller of the Currency took charge of the bank and appointed Mr. Young as receiver. Mr. Young, upon receiving his appointment or a very short time thereafter, came to this court and submitted himself to the jurisdiction of this court by filing his petition asking for a disposition of certain property of the bank. That was succeeded by other proceedings commenced in this court, so that clearly he was under the charge and control of this court.

227 A few years afterwards, under a statute of the United States, the present complainant was elected as agent to succeed Mr. Young as receiver, and his election was ratified by the Comptroller of the Currency, his bond fixed, given, and approved, and the bank turned over to Mr. Stateler, as agent.

In the meantime Mr. Chetwood, one of the parties to this suit, as a stockholder who owned, I believe, shares amounting to $2,000, commenced an action against a former president of the bank and two of its stockholders, claiming that through their negligence, they having been the managing board of directors of the bank, the bank has suffered large losses. That action was commenced in the State court. After some time a judgment was rendered by the judge of that court—at least, he expressed his intention of rendering a judgment—and the matter was referred to a referee to determine the amount of the judgment, the judge claiming that the testimony was not such as that he could arrive at a proper conclusion as to the amount of the judgment.

Subsequently, on the referee's report, a judgment was entered. In the meantime, however, Mr. Chetwood, as the plaintiff in the action, entered into a compromise agreement with two of the defendants—the two directors, Thompson and Wilson, I believe—by which he released them from the effects of this judgment on the payment of $27,500. The whole judgment was for $166,000. Thereafter judgment was entered up against the remaining defendant, Thomas, for $137,000. Subsequently Chetwood came into this court by his action against Stateler, the agent—afterwards Stateler was elected agent—setting forth various facts, asking that his
228 election as agent he held null, and that he be restrained from further proceedings in the matter connected with the fulfilment of the bank's estate. The fact is that every question involved in this case is involved in that. The settlement of that case would settle the issues here; but it seems that Mr. Chetwood commenced his action here, and the court, or the judge, refused to grant him a preliminary restraining order against Stateler.

The matter afterwards came on for hearing before Judge Morrow and is now pending before him. Subsequently this action was commenced by Stateler against Chetwood, and, as I say, involves the same questions included in the other case. Judge Morrow granted a temporary restraining order. The fact is that that case ought to be disposed of, and this ought to have rested quietly until that is disposed of, because that would dispose of all the issues in the case, as I understand from examining the papers in all the cases, to a certain extent, so the matter appears to be in that situation; that another action is pending before another judge, but in the same court, and the possible consequences are that this court will appear to be making two or three different rulings.

I desire to avoid that, and at the same time be consistent, if I can.

In this matter Chetwood, on the one hand, complains that Mr. Stateler was elected through the influence of a judgment debtor here, Thomas, and that he is in collusion with Thomas.
229 That is the burden of the complaint on the part of Chetwood.

Of course, if that matter was clearly established, it would be the duty of this court by some means to control it and prevent any stockholder from acting as the representative of all the stock-

holders. I have no positive proof of that. On the contrary, Mr. Stateler has been duly elected—at least, I am ready to hold so for the present. His election was approved by the Comptroller of the Currency, and he has given a bond. I forgot to ask the amount of that bond, but I presume the bond is of sufficient amount to make him responsible for his proper conduct in this case. If the bond is not of sufficient amount, this court should take it in hand and see that the bond is. I presume the court will have the power.

Here we have a party who is duly elected, as I hold, under bond and who has to be held responsible for any of his acts or any neglects, if he should neglect to perform his duty.

On the other hand, Stateler objects to Chetwood's action and brings these charges: that, in the first place, he improperly compromised a judgment—released one of the directors who was amply able to pay the whole debt, alleging that he was worth over a million of dollars, and that the entire debt could have been collected from him; that he released both of those directors from a judgment of $166,000 by the payment of $27,500; that of that $27,500 he has already disposed of $9,000 for attorneys' fees and another $1,000 to himself for some purpose, to be used in
230 making investigation for the estate. That makes $10,000 of the $27,000 already disposed of.

These are the charges of the two parties against each other.

It is evident to me that two parties should not be administering this estate. I regret very much, as an officer of this court, to see this estate squandered by two or three different parties attempting to collect its assets. It might turn out as a case quoted in the papers a few days ago. I do not know whether it is true or not, but the papers stated there was some large estate finally settled. There were 37 cents left in the estate, and the rest absolutely squandered. Such things are simply an outrage upon justice, and no one should be permitted to do it. I do not think this court will permit such a thing to occur.

I am of the opinion that one man should be administering the assets of this bank. It will not do for these two parties to continue this litigation and simply squander the estate, as I think would in the end be done.

I have some little fear that possibly Mr. Stateler, the agent, may be under the influence of the president of the bank, because he was virtually elected by the stock of the president; but I must recognize that he has been elected, and the court will have to keep its eye on him. If he does not perform his duties properly, he will have to be held to account. If his bond, as I say, is not sufficient, it will have to be made sufficient. I intended to have asked what the amount of that bond was. I presume the comptroller, as
231 a matter of course, performed his duty and fixed a sufficient amount as a protection to all the stockholders.

I have concluded to substantially continue the restraining order which Judge Morrow has granted. In doing this I am in harmony with what has thus far been done by the two different judges who have acted, in the one case Judge McKenna and the other Judge

Morrow, and also doing what, in my opinion, I think I should do if no other case was pending. I think I should recognize Stateler as the lawfully elected agent of the corporation, and that the duty devolves on him of settling this estate.

While a stockholder, as Mr. Chetwood is, may bring an action, I do not think he has the right to any of the funds of any fund or have any control of them to be placed in his hands whatever. Whatever he has done heretofore, his payment of those services or that of some attorney will have to be collected in some way through this court.

This is the form of the injunction that I have concluded to continue, modifying somewhat the injunction as it now exists. This may be put in proper form by the counsel, who can take it from the notes of the reporter:

That until the further order of this court or the judge thereof the defendants, The California National Bank of San Francisco, its directors, officers, employés, and said John Chetwood, Jr., his agents, servants, attorneys, solicitors, or any other representative, are hereby restrained and enjoined from commencing any further litigation against the complainant, as agent of said bank, and from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by open accounts,
232 bills, notes, or judgments or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the said bank, and from settling, allowing, or attempting to settle or allow any attorneys' charges or any other fees, expenses, or costs growing out of or which it may be claimed grew out of any past litigation in this matter, and from in any way disposing of or incumbering any of the assets, moneys, or property of said bank; but the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the supreme court of the State of California or in this court.

Mr. MITCHELL: The cases referred to in the bill in the supreme court have all been argued and submitted since we had the hearing before your honor.

The COURT: I understand that, but there may be a motion for rehearing. I leave him entirely free to prosecute or defend any of these cases pending in that court.

Mr. MITCHELL: I will have the order properly engrossed and submitted to your honor this afternoon.

BEATTY, *J.*

233 "EXHIBIT 16."

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Bank) and John Chetwood, Jr., Defendants. } No. 12155.

UNITED STATES OF AMERICA, *Northern District of California,* } *ss:*

E. G. Knapp, being duly sworn, makes return to the order to show cause herein, made and issued and served upon him November 6th, 1896, and in that behalf deposes and says—

That he is not a party to this action and knows nothing whatever of the contents of the amended or supplemental bill or of any papers on file, except those that have been served upon him. He knows nothing whatever with reference to the proceedings that took place herein on January 5th, 1896, or thereafter, except that he has been shown a copy of an injunction or order therefor.

That deponent never saw said writ until on or about the second day of October, 1896; that said writ is not such injunction
234 as is set forth in the said affidavit of T. K. Stateler, and does not undertake to prohibit the board of directors of said bank or any one else from in any way representing said bank or using its name, but the language of said writ is as follows:

"It is now ordered, adjudged, and decreed that until the further order of this court or of the judge thereof the defendants, The California National Bank of San Francisco, its directors, officers, and employees, and said John Chetwood, Jr., his agents, servants, attorneys, solicitors, or any other representative, are hereby restrained and enjoined from commencing any further litigation against the complainant as agent of said bank, and from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by open accounts, bills, notes, or judgments or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the said bank, and from settling and allowing or attempting to settle or allow any attorneys' charges or any other fees, expenses, or costs growing out of or which it may be claimed grew out of any past litigation in this matter, and from in any way disposing of or encumbering any of the assets, money, or property of said bank.

"But the defendants are not hereby enjoined from prosecuting or defending to final determination any actions in this matter now pending in the supreme court of the State of California or in this court.

"Dated February 24, 1896.

"JAS. H. BEATTY, *Judge.*

"(Indorsed:) Filed Feb. 24, '96."

15—7

235 That deponent has not disobeyed said injunction in any way that he is aware of, nor does he intend so to do, for he has the utmost respect for the orders and process of this court, and further in that behalf deponent states that he has not commenced any further litigation against said complainant, T. K. Stateler, as agent of said bank or otherwise; nor has he willfully or fraudulently or at all represented himself as attorney for said bank in open or in any violation of said or any injunction herein or in contempt of the jurisdiction of this court.

That before deponent had any knowledge of the existence of any such injunction he did take an appeal to the Supreme Court of the United States from a judgment and decision rendered by the supreme court of the State of California on July 22, 1896, in an action then pending in said court, which said action was pending on the 24th day of February, 1896, and prior thereto.

That said appeal was taken by sueing out a writ of error, which said writ of error, with the security or bond and citation, were, on said 24th day of September, 1896, handed to the Hon. Stephen J. Field, associate justice of the Supreme Court of the United States, with a copy of the record in such case sought to be reviewed and an assignment of errors, which was placed in the form of a petition for such writ of error.

That said papers were taken by said associate justice to Washington, D. C., and thereafter said writ was allowed and said bond approved and said citation signed, and thereafter said papers
236 were served and filed with the clerk of the supreme court of this State, and copies of the said papers, with the endorsements thereon, are hereto attached and made part hereof and lodged with this court; that A. W. Thompson, Esq., took no part in sueing out said writ of error or in the proceedings hereinbefore recited with reference thereto.

That the name of said corporation was used as a plaintiff in error in entire ignorance of any claim on the part of any person that such an action was or could be an infringement or violation of any writ or order whatever and in entire ignorance of the existence of the aforesaid injunction; that thereafter deponent took a second appeal in the said matter to the said Supreme Court of the United States from a judgment and decision of the supreme court of said State rendered on August 7th, 1896, and for that purpose and to that end sued out a writ of error to review said decision and placed the same, with an assignment of errors in the form of a petition for a writ and a bond and citation, in the hands of the Hon. Wm. H. Beatty, chief justice of the State of California.

That thereafter, on or about the 22nd of October, 1896, said writ last mentioned was allowed by said chief justice and said bond approved and said citation issued, and said writ and citation then served and filed, with said bond, with the clerk of said supreme court of this State, and a copy of said writ and citation, with the endorsements of admission of service and the filing thereof, are hereto annexed and made a part hereof and lodged with this court.

That, with the exception of the preparation and filing of
237 petitions for rehearing in said supreme court of this State in both of said appeals, this is all that deponent has done in said matter.

That it was impossible for the deponent to obtain or move within the limited time allowed him for a modification or even a construction of the writ or injunction aforesaid, and deponent further states that he did not deem and does not deem that the same was necessary, since the said writs of error are in effect nothing more nor less than process for obtaining a final determination of the said actions in this matter then and now pending in the supreme court of the State of California.

That if deponent is mistaken in the aforesaid belief he believes he is in duty bound to submit to the orders of this court, but he asks that this court decline to punish him for said action as for a contempt of the said injunction, on the ground that if the matter had been brought to the attention of this court at the time said writ of injunction was issued or if time had permitted deponent to bring such matter to the attention of this honorable court this court would undoubtedly have made an order so construing this writ of injunction as to leave deponent entirely and wholly free to prosecute his appeal and writ of error in the name of either said corporation or of said John Chetwood, Jr., or both, in the said Supreme Court of the United States, to final determination for the purpose of obtaining a final decision of all the matters in controversy between said corporation and said T. K. Stateler, claim-
238 ing to be its agent, and said John Chetwood, Jr., and other stockholders interested with him.

Deponent further states that he has received no such notice as said T. K. Stateler states in his affidavit was give- the attorneys of said bank. He further states that the motion for an allowance for fees made by said Chetwood and signed by deponent in ignorance of the existence of said injunction has been withdrawn by said Chetwood.

Deponent further states that he has not commenced any further litigation against the complainant nor done anything in prosecuting any of its pending litigations against said complainant, except as aforesaid; that he has commenced no new suits, and that deponent has not, directly or indirectly, taken or attempted to take any control or possession of any of the funds or assets or property of said bank, and in this behalf deponent states that the fund of $27,500, which was paid into the superior court of the city and county of San Francisco, State of California, in the action thereafter appealed to the supreme court and hereinbefore referred to, which said fund said T. K. Stateler claims to be assets or property of said bank, is not and never was, as deponent is informed and believes, property of the said banking corporation; that the said sum of money was paid in by R. R. Thompson and R. A. Wilson to secure their release and dismissal from said suit, and was paid in to be administered upon and distributed by said court amongst the stockholders of said corporation to repay them the losses they had

sustained by reason of the negligence of said Wilson and said R. R. Thompson; that the parties, to wit, said Thompson and said Wilson, who paid in said money, expressly stipulated and
239 agreed that they would not share in or claim any portion of said fund as stockholders or allow shares of stock belonging to them to be used for the purpose of claiming any portion or share in said money.

That thereafter the said supreme court of this State decided, on the appeal of R. P. Thomas, on July 22, 1896, that the said payment into court by said defendants was paid for the benefit of all three of said defendants, Thomas, Thompson, and Wilson, and that said payment was an accord and satisfaction and constituted a discharge and release of said R. P. Thomas, and of all claim that the said corporation and its stockholders had against him, as fully and entirely as the said R. R. Thompson and R. A. Wilson were released and discharged.

That said R. P. Thomas, appellant, claimed that such was the case, and asserted his claim in the supreme court of this State and succeeded in obtaining a decision as aforesaid in his favor thereon; that by so doing and by the said decision that he, said R. P. Thomas, is entitled to the benefit of said payment of $27,500, the said R. P. Thomas, under the ordinary principles and rules of equity and in accordance with the statutes of this State, assumed the burden that accompanied said advantage and benefit, to wit, the agreement that the parties who paid said money and obtained such release thereby should not, and that their stock should not, share in any portion of said fund of money so paid to secure such release, and said Thomas, by reason of the foregoing, ought not to have or receive any portion of said money. The said fund is, therefore, if the said decis-
240 ion of July 22, 1896, be sustained, not the property or assets of the said bank, but is the property of the minority stockholders of said bank.

That the foregoing is one of the questions which deponent desires to submit to the Supreme Court of the United States, in addition to the points made in this court and in the supreme court of this State upon the regularity of the appointment of said T. K. Stateler and his right to act as such agent and control the affairs and assets of said bank.

That deponent repeats that he makes these points and has taken or attempted to take the aforesaid appeals, to with, the aforesaid writs of error, without any intention whatever of violating any order or writ of this court and without any contempt whatever for this court or its officers or orders, and that, on the contrary, he has the utmost respect for the said court and its orders, and he has not proceeded any further in the said matter; but he asks that this court make an order permitting him to proceed with the said writs of error in the said Supreme Court of the United States, in order that a final and authoritative determination of these questions be had by the court of last resort in all such matters as speedily and inexpensively as possible, and that meanwhile the order to show cause which has been issued against deponent be discharged, and

that all proceedings thereon or in this action that look towards the prevention of such proceedings in prosecution of said writs of error be superseded, stayed, and abated until such final determination.

And deponent, as in duty bound, will ever pray.

E. G. KNAPP.

Subscribed and sworn to before me this 10th day of November, A. D. 1896.

N. E. W. SMITH,
Notary Public, etc.

[SEAL.]

241 "EXHIBIT 16" (Continued).

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, being the highest court of law or equity in the said State in which *I* decision could be had in the said suit between John Chetwood, Jr., plaintiff and respondent, and The California National Bank of San Francisco, defendant and respondent, and Richard P. Thomas, defendant and appellant, wherein was specially set up and claimed by the said California National Bank and by John Chetwood, Jr., plaintiff and respondent, in its behalf, a title and right under the Revised Statutes of the United States, sec. 5136 and other sections, and under the Constitution of the United States and the fourteenth amendment thereto, and the decision was against said right, title, and privilege, and said decision deprived said California National Bank of its property without due process of law and contrary to the law of the land, and denied it the equal protection of the laws, a manifest error hath happened, to the great damage of the said California National Bank of San Francisco, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-
242 cerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the 23rd day of November next, in the said Supreme Court of the United States to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 24th day of September, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and 21st.

Seal of said U. S. Circuit Court.

W. J. COSTIGAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit and Northern District of California,
By W. B. BEAIZLEY,
Deputy Clerk.

The above writ of error is hereby allowed.
STEPHEN J. FIELD,
Justice of the Supreme Court of the United States.

Endorsed: Filed Oct. 19, 1896. T. H. Ward, clerk, by A. W. Johnson, deputy.

243 "EXHIBIT 16" (Continued).

UNITED STATES OF AMERICA, *ss:*

To Richard P. Thomas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 23rd day of November, A. D. 1896, pursuant to a writ of error which has been allowed and filed in the office of the clerk of the supreme court of the State of California, wherein The California National Bank of San Francisco is the plaintiff in error and you are defendant in error, to show cause, if any where be, why the judgment and decision in the said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 24th day of September, A. D. 1896, and of the Independence of the United States the one hundred and twenty-first.

( )

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

Endorsed.

Personal service of within citation on said defendant in error and on his attorneys admitted this 19th day of October, A. D. 1896.

PIERSON & MITCHELL,
Attorney- for R. P. Thomas, Defendant in Error.

244 Service of the foregoing writ of error and citation admitted Nov. 6, 1896.

ROB'T A. FRIEDRICH,
Attorney for T. K. Stateler, Defendant in Error.
J. A. STEPHENS,
Formerly Attorney for R. P. Thomas.
AYLETT R. COTTON,
Att'y for S. P. Young.
MASTICK, BELCHER & MASTICK,
Attorneys for R. A. Wilson.

Service of the foregoing writ and citation *are* hereby admitted as a defendant in error, but this defendant in error asks that he be entered as a plaintiff in error herein instead, and for that purpose, if necessary, said writ be amended in that regard.

JOHN CHETWOOD, JR.,
In Propria Persona.

Filed Oct. 19, 1896.

T. H. WARD, *Clerk*,
By A. W. JOHNSON, *Deputy*.

245 "EXHIBIT 16" (Continued).

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between John Chetwood, Jr., plaintiff and respondent, and The California National Bank of San Francisco, defendant and respondent, and Richard P. Thomas and R. R. Thompson and R. A. Wilson and S. P. Young, defendants, and T. K. Stateler, defendant and appellant, wherein was specially set up and claimed by said John Chetwood, Jr., and by said California National Bank of San Francisco, on behalf of itself and its stockholders, a title and right under the Constitution and laws of these United States and the decision of the said supreme court of said State was against said right, title, and privilege and said decision deprived said corporation of its franchise and property without due process of law and contrary to the law of the land and denied it the equal protection of the laws, a manifest error hath happened, to the great damage of the said California National Bank of San Francisco and John Chetwood, Jr., as representative stockholder therein, as by their complaint ap-
246 pears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the fifteenth (15th) day of December next, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of October, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and 21st.

Seal of said U. S. Circuit Court.

W. J. COSTIGAN,
Clerk of the U. S. Circuit Court, Ninth Circuit, Northern District of California,
By W. B. BEAIZLEY,
Deputy Clerk.

The above writ is hereby allowed.
W. H. BEATTY,
Chief Justice of California.

Filed Oct. 30th, 1896.

247 "EXHIBIT 16" (Continued).

UNITED STATES OF AMERICA, *ss:*

To T. K. Stateler, S. P. Young, Richard P. Thomas, Robert R. Thompson, Robert A. Wilson, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 15th day of December, A. D. 1896, pursuant to a writ of error which has been allowed and filed in the office of the clerk of the supreme court of the State of California, wherein The California National Bank of San Francisco and John Chetwood, Jr., as representative stockholder, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment and decision in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 26th day of October, A. D. 1896, and of the Independence of the United States the one hundred and 21st.

W. H. BEATTY,
Chief Justice of California.

Endorsed.

Service of within citation, by copy, admitted this second day of November, A. D. 1896.

PIERSON & MITCHELL,
ROB'T J. FRIEDRICH,
Attorney- for T. K. Stateler, Defendants in Error.

248 MASTICK, BELCHER & MASTICK,
Attorneys for R. A. Wilson.

S. P. YOUNG,
By AYLETT R. COTTON, *His Attorney.*

S. F., CAL., *Nov. 5th*, 1896.

Received copy of the within, but have substituted Pierson & Mitchell as attorneys in this case for R. P. Thomas, for whom I formerly appeared.

J. A. STEPHENS.

NOV. 2ND, '96.

Served personally on R. P. T. by D. S. O.

249 E. G. Knapp, law office, Mills bldg., rooms 31 and 5, sixth floor.

SAN FRANCISCO, CAL.

As a formal party merely, I admit service of the foregoing writs of error and citations, that the Supreme Court of the United States may have complete jurisdiction to review the said decisions of the supreme court of California.

But with this reservation and objection, that such jurisdiction does not and cannot authorize either of said courts to review or in any way disturb the orders and judgment of the superior court of the city and county of San Francisco wholly dismissing me from said cause.

250 "EXHIBIT 17."

In the District Court of the United States in and for the Northern District of California—Hon. W. W. Morrow, Judge.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO *et al.*, Defendants.

THURSDAY, *November* 19, 1896.

The COURT (orally): This is a proceeding for the punishment of the respondents for contempt of the authority of this court by resisting the provisions of an injunction issued in this case by Judge Beatty on February 24, 1896.

The original action was brought to secure a judgment and decree of this court adjudging, among other things, that the complainant

was the duly elected, qualified, and acting agent of the defendant The California National Bank of San Francisco, and as such exclusively entitled to have and receive in his custody and under his control all the moneys and property of said bank and to collect the outstanding indebtedness due to said bank, whether the same
251 be evidenced by open account, bills, notes, or judgments of record, to the end that the affairs of the bank might be wound up, its property converted into money, and its money distributed among its shareholders as provided by the national banking laws of the United States; that all the acts of the defendant banking association, through its alleged board of directors, as set forth in the bill, since the appointment of a receiver to take charge of its affairs, be adjudged null and void, and that its board of directors has no authority to take any action touching the affairs of the association; that the said bank, its board of directors, officers, and employees, and John Chetwood, Jr., his agents and servants, and each and every of their attorneys, solicitors, and counselors, be forever restrained and enjoined from denying the rights of the complainant to the said office of agent of said banking association, and from denying his right as such to the exclusive control of the assets of said bank, and from commencing any further litigation against him as such agent, and from prosecuting or defending any actions heretofore brought by them or either of them against the complainant as such agent touching his right to said office and touching his exclusive right as such agent to collect the assets of said bank, and that the said bank, its board of directors, officers, and employees, and the said defendant, Chetwood, his agents and servants, and each and every of their said attorneys, solicitors, and counselors, be forever restrained and enjoined from commencing any further suits to collect any outstanding debts due said
252 bank, whether the same be evidenced by an open account, note, or judgment, and particularly from attempting in any manner to collect the judgment heretofore secured for said bank against one Richard P. Thomas and referred to in the bill.

Upon this bill an order was made by the court requiring the defendants to show cause why an injunction should not issue pending the determination of the matter involved in the suit, and upon the hearing of the order to show cause the court issued an injunction *pendente lite*, restraining and enjoining the California National Bank of San Francisco, its directors, officers, and employees, and said John Chetwood, Jr., his agents, servants, attorneys, solicitors, or any other representatives, from commencing any further litigation, and from commencing any further suits to collect any outstanding debts due said bank, whether the same be evidenced by open accounts, bills, notes, or judgments or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the said bank, and from settling and allowing or attempting to settle or allow any attorneys' charges or any other fees, expenses, or costs growing out of or which it may be claimed grew out of any past litigation in this matter, and from in any way disposing of or encumbering any

of the assets, money, or property of said bank; but the defendants were not enjoined from prosecuting or defending to final determination any action in this matter now pending in the supreme court of the State of California or in this court.

There are two petitions in the form of affidavits before
253 the court, charging the respondents with the violation of this injunction, both signed by T. K. Stateler. The first, after referring to the injunction, sets forth that on the 19th day of September, 1896, the said John Chetwood, Jr., caused to be filed in the superior court of the city and county of San Francisco, State of California, in an action then pending therein, entitled "John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants," and numbered 30052 on the files of said court, a notice that on the 25th day of September, 1896, at ten o'clock a. m., he would apply to said court to make an allowance out of the funds on deposit in said court to the credit of the above-entitled action to him for alleged costs, disbursements, expenditures, attorneys' and counsel fees claimed to have been made and incurred by him and about to be made and incurred by him in behalf of the defendant banking corporation and the stockholders thereof, and which said fund belongs to the defendant bank and which is the fund particularly referred to in the amended bill of complaint herein, a copy of which notice is attached to the affidavit; that thereafter the hearing of said motion was continued until the 2nd day of October, 1896, whereupon the attention of said superior court was called to the issuance of the injunction out of this court, and the said superior court thereupon continued the hearing of said motion for allowance two weeks, until the 16th day of October, 1896; that W. H. Metson, of the firm of Reddy, Campbell & Metson, who signed said notice, along with Thompson & Thompson, as the attorneys for the
254 plaintiff, stated upon said hearing that he was ignorant of the issuance of said injunction, and that neither he nor his firm would proceed any further in support of said motion while said injunction stood; that thereafter an application was made to this court for an order modifying the injunction so as to permit the respondents to apply to the said superior court for an allowance of the fund therein belonging to the bank for attorneys' fees and costs, and the application was denied; that four days had expired since said last-named date, and the said John Chetwood, Jr., has failed, neglected, and refused to withdraw the motion in said superior court for a further allowance out of said fund, but the said motion is now pending; that the affiant is informed and believes that said fund will not be turned over to the statutory agent of the bank while the motion of the said defendant, John Chetwood, Jr., is pending in said superior court for a further allowance out of said fund, and that in maintaining said motion the said John Chetwood, Jr., and his attorneys, Thompson & Thompson, and his counsel, E. G. Knapp, are openly defying the order and writ of this court.

It appears that on the 14th day of January, 1889, the Comptroller of the Currency, after an examination into the condition of the California National Bank of San Francisco, declared the corporation

insolvent under section 1 of the act of Congress authorizing the appointment of receivers of national banks, and for other purposes, approved June 30, 1876, and thereupon appointed a receiver to take charge of its affairs; that on the 6th day of July, 1894, the Comptroller of the Currency having paid to the creditors of the
255 bank the full amount of their claims and all expenses of the receivership and the redemption of the circulating notes having been provided for, a meeting of the shareholders was called for the purpose of having the shareholders determine whether the receiver should be continued and wind up the affairs of the association or whether an agent should be elected for that purpose.

It is alleged that at this meeting 1,020 out of the 2,000 shares, constituting the entire capital stock of said banking association, were represented and voted, and that the said 1,020 shares voted in favor of electing an agent to succeed the receiver, and thereupon T. K. Stateler was elected agent of the bank for the purposes set forth in the statute and entered upon the duties of his office.

It further appears that at the time the bank suspended payment, and at the time the Comptroller of the Currency declared it to be insolvent, and at the time he appointed a receiver to take charge thereof, its board consisted of seven members, to wit, R. P. Thomas, president; R. A. Wilson, vice-president; R. R. Thompson, George E. Whitney, William K. Vanderslice, Charles H. Holt, and B. Noyes; that on the 19th day of July, 1890, and while the receiver was in office, John Chetwood, Jr., holding 20 shares of the capital stock of said banking association, commenced a suit in the superior court of the city and county of San Francisco against the said California National Bank of San Francisco, Richard P. Thomas, Robert R. Thompson, Robert A. Wilson, and S. P. Young, receiver of the said
bank, to recover from the defendants Thomas, Thompson,
256 and Wilson, as the executive committee of the board of directors of the bank, the sum of four hundred thousand dollars as damages for negligence, being the amount claimed by the plaintiff to have been lost to the bank by reason of unfortunate investments made by the cashier, and which losses the plaintiff Chetwood claimed could not have occurred if the said three defendants in that action had properly supervised the acts of the cashier. All the defendants appeared in the action, and the case was tried on the 27th day of April, 1894, resulting in a judgment in favor of the plaintiff Chetwood for the benefit of the corporation, as against the defendants Thomas, Thompson, and Wilson, for an amount equal to the actual loss of the bank resulting from the bad investments made by the cashier. The matter was referred to a referee to ascertain the amount of such bad investments, who filed a report on the 17th day of August, 1894, from which it appeared that the loss sustained by the bank from such bad investments amounted to one hundred and ninety-seven thousand and ninety-two and ninety-one one-hundredths dollars; that on the 24th day of September, 1894, a stipulation was filed in this action whereby the complainant Chetwood withdrew his cause of action against the defendants Thompson and Wilson, and directed a judgment of dis-

missal to be entered accordingly. Part of the consideration for such dismissal was the payment by the said Thompson and Wilson into court of the sum of twenty-seven thousand five hundred dollars. On the 20th day of November, 1894, findings were filed in the said superior court in said action, in which it was found that the amount
257 of the actual loss to the corporation through the negligence of the said three defendants was the sum of one hundred and sixty-six thousand nine hundred and nineteen dollars; that twenty-seven thousand five hundred dollars had been paid thereon by Thompson and Wilson, leaving the net loss to the bank the sum of one hundred and thirty-nine thousand four hundred and nineteen dollars, for which amount the court ordered a judgment to be entered against the defendant Richard P. Thomas, who appealed from the judgment to the supreme court of the State, where the judgment of the lower court was reversed, with directions to the trial court to enter a judgment in favor of the defendant Thomas, the supreme court holding that where several defendants are charged as joint tort-feasors a release of any one of them, by withdrawal of the action against him or the payment of a sum agreed upon between him and the plaintiff, operated to release other defendants from all further liability. (45 Pacific Reporter, 704.)

It appears further that after the entry of the judgment in the superior court, as before mentioned, Stateler, as agent of the bank, petitioned the court for an order requiring Chetwood to turn over to him the twenty-seven thousand five hundred dollars received by Chetwood in that action. The superior court refused to make that order, and Stateler appealed to the supreme court of the State, when the order of the superior court was reversed, the supreme court holding that where an action brought by a stockholder in a national bank in behalf of a corporation while in the hands of a re-
258 ceiver has terminated, an agent of the corporation elected to succeed the receiver, as provided by law, and charged with the duty of controlling and disposing of its assets and of distributing the proceeds, is entitled to receive the proceeds of such action, less reasonable allowance to the plaintiff for his costs, disbursements, and attorneys' fees. Some question was raised in the supreme court concerning the regularity and validity of the proceedings of the shareholders which resulted in the election of Stateler as agent of the bank and the assignment to him by the comptroller and the receiver of the assets of the corporation; but the court held that, Stateler being *de facto* the agent and presenting his commission from the comptroller, reciting his appointment and the regularity of the proceedings attending it, the question of the regularity of his appointment was not to be raised upon collateral attack in that action. 45 Pac. Rep., 845.

The present proceedings for contempt against the respondents relate to their action with respect to the case just described in the State court, and the petition now under consideration has particular reference to the action of Chetwood in seeking to secure an order of the superior court making him an allowance out of the fund of twenty-seven thousand five hundred — in the custody of the court for

his costs, disbursements, expenditures, and for attorneys' and counsel fees on account of services rendered and to be rendered by him.

This action was specifically prohibited by the injunction in this case granted by Judge Beatty on February 24, 1896. The
259 respondent contends that he was entitled to make that application to the superior court because of the provision contained in the judgment of the supreme court reversing the order of the superior court, "with directions to the trial court to enter the order prayed for after making reasonable allowance to plaintiff Chetwood for his costs, disbursements, and attorneys' fees in the said action, as contemplated by law." It was, however, in direct conflict with the terms of the injunction issued out of this court. Moreover, it does not appear that the supreme court had been advised of the fact that Chetwood had already been allowed and paid out of the fund in the superior court the sum of five hundred and sixty dollars and sixteen cents for expenses claimed to have been incurred by him in prosecuting the action in the superior court, and nine thousand dollars for attorneys' fees, and an additional sum of one thousand dollars for the payment of detectives to find the property of the defendant Thomas. It was for the purpose of protecting the balance, sixteen thousand nine hundred and forty dollars, remaining out of the twenty-seven thousand five hundred dollars obtained on the judgment against Thompson and Wilson, that the present action was instituted in this court by Stateler against The California National Bank and John Chetwood, Jr., and the injunction was issued.

The affidavits of E. G. Knapp and W. H. Metson show that they knew nothing of the injunction when they appeared in the superior court on behalf of Chetwood in support of his application
260 for the allowance mentioned, and the affidavit of A. W. Thompson shows that within a month after the injunction was issued in this case he withdrew from the litigation in which Chetwood was engaged in these cases, and while he had been attorney of record he had taken no part in the proceedings.

The second order to show cause relates, first, to the petition of Chetwood, Knapp, Thompson, Vanderslice, Holt, and others, presented to the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, for a writ of error from the supreme court of the State of California to the Supreme Court of the United States to *renew* the judgment of the supreme court of this State in reversing the judgment secured by Chetwood against Thomas, and for the purpose of said writ of error made The California National Bank the plaintiff in error and Richard P. Thomas and John Chetwood, Jr., the defendants in error. The names of Knapp and Thompson were signed to that petition as attorneys for the said bank. The second order to show cause relates also to a petition presented by John Chetwood, Jr., and E. G. Knapp to the Honorable W. H. Beatty, chief justice of the State of California, for a writ of error to the Supreme Court of the United States to review the order of the supreme court of the State of California which directed the fund in the superior court to be turned over to Stateler,

as the agent of the bank, and for the purpose of obtaining that writ entitled the proceeding "The California National Bank of San Francisco and John Chetwood, Jr., representing stockholders, plaintiffs in error, *vs.* T. K. Stateler (agent), S. P. Young
261 (receiver); Robert A. Wilson, Richard R. Thompson, and Richard P. Thomas, defendants in error." In that petition E. G. Knapp was represented as the attorney for said bank. It appears that the attorney of record for the bank in the superior court, in said suit of Chetwood *vs.* The California National Bank of San Francisco *et al.*, has at all times been H. D. Talcott, Esq., but that the bank did not appear on either of said appeals in the supreme court of the State, nor was any petition for a rehearing ever filed on either of said appeals by said bank or by any one else in the name of the bank, and that Stateler has given no authority to any one to represent said bank, but, prior to the issuance of the writs of error mentioned, caused his attorney to notify the attorneys for Chetwood that if any attempt was made by him or the officers of the bank or their attorneys to further delay the turning over of said fund to the complainant in this case, as the agent of the bank, it would be considered by him an open contempt of the United States circuit court and would be reported to said court for action.

From the affidavits that have been filed it appears, as before stated, that soon after the injunction was issued in this case Mr. A. W. Thompson withdrew from the litigation in which Chetwood was engaged and has taken no part in the proceedings. It appears, also, that Knapp knew nothing of the injunction when he sued out the first writ of error.

There is a rule of law with respect to contempt of court which determines that if the person charged comes into court and purges himself of contempt by an affidavit showing that he did not
262 do any of the things charged against him, or that he had no notice that he was violating the order of the court, the order to show cause will be discharged, because it is said that, the accused having fully purged himself of contempt, the court will go no further. If in his affidavit he has stated any fact that is denied and made a matter of issue that issue must be tried elsewhere, because the court is not authorized to try any question of fact in this character of proceedings. Therefore in this case the court must accept these affidavits made by the respondents as true. It may be, however, that the affidavits on the part of the respondent disclose a case where the court would say that a contempt had been committed, notwithstanding the affidavit, because the facts set forth in the affidavit did not meet fully the facts set forth in the papers on the order to show cause.

I refer to this because in this case Mr. A. W. Thompson shows by his affidavit that he is not an attorney in these cases; that he has had nothing whatever to do with them, and that the use of his name has been practically unauthorized, although he does not quite go that far. He says he has been ready to sign an order of substitution whenever he should be advised of the name of the person who is to take his place; but, he says, he has not acted in the matter;

has given no authority to act in the matter, and knows nothing about these proceedings or about the injunction. I must accept that affidavit as true. Therefore the order to show cause in his case must be discharged.

263 Mr. MITCHELL: Both orders?

The COURT: Yes; both orders in the case of Thompson.

With respect to Mr. Vanderslice, he also by his affidavit sets up that he does not know anything about these proceedings. Therefore I shall discharge the order to show cause in his case on the second order.

With respect to this feature of the case, I will refer to the case of Pettibone *vs.* The United States, 148 U. S., 197. It was a case which arose in Idaho. The parties were indicted for a conspiracy to violate an injunction which had been issued by a United States court. The same principle of law would obtain with respect to an order to show cause why respondent should not be punished for a contempt of court. It appears that the parties who had violated the injunction had not been notified of the order of the court. The court says:

"The combination to commit an offense against the United States was averred to consist of a conspiracy against the State and the completed act to have been in pursuance of such conspiracy; but the pleader carefully avoided the direct averment that the purpose of the confederation was the interruption of the courts of justice in the United States court, nor did the indictment charge that the defendants were ever served with process or otherwise brought into court or that they were ever in any manner notified of the issue of the writ or of the pendency of any proceedings in the circuit court."

This is a reference to the injunction:

264 "That this omission was advisedly made is apparent from the statement in the bill of exceptions that there was no evidence given on the trial showing or tending to show that the writ of injunction mentioned and set forth in the indictment was served upon the defendants or either of them or that they or either of them had any notice or knowledge of the issue thereof."

The judgment of the court was that in view of the fact, among other things, that the defendants had no notice of the injunction the judgment of the court below be reversed and the cause remanded with instructions to quash the indictment and discharge the defendants. The doctrine here announced is applicable to this case.

In the case of Mr. Knapp it appears by affidavit that he did not know of this injunction when he made application to the court for the allowance of money and the expenses to Chetwood, and that with respect to the first writ of error taken from the judgment of the supreme court of this State he did not know at the time he made that application that there was any injunction pending or any injunction in the case that prevented him from taking that action. With respect to the second writ of error, the one signed by Chief Justice Beatty, of the supreme court of this State, Knapp does not deny that he knew of the existence of the order at that time;

but, as I understand, his affidavit and his statement is that he did not know that the order would be construed as a prohibition against a writ of error in this case. While he knew of the order, he
265 did not so construe it. He read the order as permitting the appeal; that he understood that when the order said it did not prevent the carrying of that case to a final determination it did not prevent him from taking a writ of error in that case. Undoubtedly the same argument would be based with respect to the first writ of error, that if he had then known there was such an injunction he would still have so construed it as permitting him to take a writ of error in that case.

With respect to the first case and the first element of the second case, the proceedings against Mr. Knapp are discharged.

That leaves the case against him involving the writ of error in the Stateler case, wherein he admits or does not deny that he knew of the existence of the order, but thought it did not prevent him from taking an appeal in that case.

Before proceeding further I will indicate my views with respect to this case, although it does not necessarily enter into the determination of the contempt proceedings, but in order that counsel may understand my views concerning these cases.

In addition to the cases cited yesterday, there is another case in the Supreme Court of the United States which passes upon the statute cited by Mr. Campbell. Mr. Campbell referred to section 3 of the act of August 13, 1888, providing "that every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the
266 previous leave of the court in which such receiver or manager was appointed, but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

This particular statute was cited to the court as giving the right to any person to sue a receiver; that persons who had any claim against the receiver might sue him without applying for leave to the court of the United States in which the receiver was appointed, and he might prosecute that suit to final conclusion, and that if this injunction prevented any one from availing himself of the provisions of this statute the injunction was contrary to law and was void; that in this case the right of these parties to prosecute this appeal not only was a right to carry the case to a final determination growing out of the case, but was a right which was given to *him* by law.

I do not so understand this statute, and I find my view of it is confirmed by the Supreme Court of the United States, *In re* Tyler, 149 U. S., 164. This was a case where certain railroad property in the possession of a receiver of the United States circuit court in a cause within its jurisdiction and protected by its injunction was levied upon by Tyler as sheriff of Aiken county, South Carolina, under a tax execution or warrant issued by the county treasurer. The railroad company became subject to certain taxes in the States

through which the road was operated. It was a provision of
267 the law of the State that where taxes became delinquent an execution or warrant might be issued by the treasurer of the county where the property is located and placed in the hands of the sheriff, and he was authorized to collect the taxes by the levy and sale of property. Tyler, the sheriff, was cited for contempt of court in interfering with the possession of the property by the receiver. There was a controversy concerning some portion of the taxes. The matter was brought up before the circuit court. Tyler was adjudged guilty of contempt of court. He applied to the Supreme Court of the United States, asking to be discharged on a writ of *habeas corpus*. In the Supreme Court of the United States the case was presented very strongly by a number of distinguished lawyers, John Randolph Tucker being one of the attorneys for the petitioner. They set up the power of the State to collect taxes; that it was a power that could not be interfered with by the United States; that by the statutes of the State it was provided that the collection of taxes should not be stayed or prevented by any injunction, writ, or order issued by any court or judge thereof; that it was a sovereign power belonging to the State by reason of its sovereignty as a State, and that any restraint or any action on the part of any court in preventing the State to satisfy its claim for taxes would be a direct assault on the independent sovereignty of the State. It is a very strong case, there is no question about it, where a sheriff, holding the warrant of the treasurer, which is substantially the warrant of the State, is authorized to collect taxes due to the State. It is
268 true that there was some controversy as to the amount of the taxes, but the sheriff was clothed with the sovereignty and power of the State to collect these taxes. Many cases were cited where the courts have said that the officer collecting taxes cannot be interfered with. But the Supreme Court of the United States held that this jurisdiction and authority of the receiver is exclusive.

The Supreme Court, speaking through Chief Justice Fuller, said:

"No rule is better settled than that when a court has appointed a receiver his possession is the possession of the court for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court, and that if any person without leave intentionally interferes with such possession he necessarily commits a contempt of court and is liable to punishment therefor," citing a number of cases.

"Ordinarily the court will not allow its receiver to be sued touching the property in his charge, nor for any malfeasance of the parties or others without its consent; and while the third section of the act of Congress of March 3, 1887"—this is the statute referred to in the argument yesterday as permitting suits against the receiver—"now permits a receiver to be sued without leave, it also provides that 'such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary for the ends of justice.'

Neither that nor the second section, which provides that the
269 receiver shall manage the property 'according to the valid laws of the State in which such property shall be situated,' restricts the power of the circuit court to preserve property in the custody of the law from external attack.

"In this case, instead of issuing an attachment against the petitioner at once for forcibly seizing the rolling stock of this railroad under the circumstances appearing upon the face of the record, the court adopted the course of serving him with a rule to show cause and with an order restraining him in the meantime from interference with the property. The petitioner refused to release the property upon request of the receiver, and persisted in his attempt to hold possession thereof by force, in disregard of the order of the court.

"The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded; but it is contended that this salutary rule has no application to the collection of taxes. Undoubtedly property so situated is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is, and the lien for taxes is superior to all other liens whatsoever except judicial costs when the property is rightfully in the custody of the law; but this does not justify a physical invasion of such custody and a wanton disregard of the orders of the court in respect of it. The maintenance of the system of checks and balances characteristic of
270 republican institutions requires the co-ordinate departments of government, whether Federal or State, to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached upon save in violation of this fundamental principle.

"The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrated the property to answer the exigency of the writ, but property in the possession of the receiver is already in sequestration, already held in equitable execution, and, while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done, and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

I cannot imagine a stronger case or stronger language declaring the exclusive possession of the receiver and that parties must not interfere with the receiver. If they have any claim against the property, they must go into the court where the receiver is appointed. If they have any actions against the receiver, they must go here with them. If they have claims of any character against the receiver, they must go to the court having possession of the property.

The reason of this doctrine is very clear because, unless
271 this jurisdiction is exclusive, it will necessarily result in de-

stroying property and wasting it in needless and useless litigation. We will have, as in this case, a number of suits, so many, indeed, that when they come up in the various proceedings the court will find it difficult to get the bearings in determining the relation and significance of the smallest order.

It is plain that all this litigation ought to be carried on in one court, and as far as possible in one case; and, since this court obtained original jurisdiction over the bank and the receiver and agent, it is clear that the jurisdiction of this court over the litigation ought to be maintained. Moreover, any assumption with respect to Mr. Stateler's position as the agent of this bank that it can be better disposed of by some proceeding in the State court would be assuming that this court would not perform its duty or give proper construction to the law or determine the rights of the parties correctly. It must be assumed that the jurisdiction is correctly given and must be exercised. Personally, I could wish not to draw to this court any jurisdiction, unless it is clearly imposed upon it; but when the court finds that jurisdiction has been conferred, although the courts of the United States are courts of limited jurisdiction, it is the duty of the court to see to it that that jurisdiction is protected, and that litigants in this court are secure in their rights.

That is the general law upon the subject. Many authorities might be cited to sustain the authority of the court in such a case
272 as is here presented. Many authorities have been cited by counsel in this case to show the scope of the jurisdiction of the court where a receiver has been appointed.

I draw the conclusion from this case of Tyler that this statute of 1888 does not in any way limit the jurisdiction of this court or its authority to protect the receiver, because this is a bill in equity, and Mr. Stateler is acting as the receiver of this corporation under the law of the United States, and therefore must be protected in that respect.

With respect to the proceedings in the State court, I am of the opinion that in the appeal in the main case of Chetwood *vs.* The California National Bank the writ of error may be prosecuted to the Supreme Court of the United States.

Mr. MITCHELL: Thomas' appeal?

The COURT: Yes; in the Thomas appeal case, by Mr. Chetwood, but that he is not authorized to use the name of the bank in that appeal. My present impression is that I am not depriving Mr. Chetwood of any opportunity to test any question that might arise between him and any other party involved in that case in the supreme court. It is not my purpose to interfere with the final determination of the issues involved in that case, in whatever court may have jurisdiction, but I do not think he is entitled to use the name of the bank in that appeal.

With respect to the Stateler case, I am not quite so clear. It seems to me that the same principle that I have announced in the case just referred to, if applied in the Stateler case, will accomplish all that the court now thinks is within its jurisdiction, namely,

273 that with respect to the Stateler case the name of the bank cannot be used. It is true it is said that the cause is being prosecuted for the purpose of having it determined whether or not Stateler was properly appointed and elected treasurer of the bank. That question, in my judgment, cannot be determined in that way. That is the question involved in this case here. That question must be determined in this case, and whichever way the court determines it an appeal will lie from such determination to either the court of appeals or the Supreme Court of the United States. That is the proper way to have that question determined. I cannot consent that the same issues shall be carried forward in two different actions, one in the State court and one here. A multiplicity of suits must be prevented, and in doing so that question should only be raised and determined here. I am not so certain but that there are other questions involved in the Stateler case.

Mr. MITCHELL: Is your honor aware that that writ of error to review the Stateler case operates as a supersedias and ties this fund up in the State court indefinitely?

Mr. KNAPP: Not indefinitely; only until it is decided.

Mr. MITCHELL: That money should be brought here and distributed by this court.

The COURT: If that case is prosecuted only between the parties remaining in that case, and it does not prosecute an appeal on behalf of the bank, I do not see why that money is not left there to be disposed of and brought into this court.

Mr. MITCHELL: It cannot be. The State court has made the order and the law is plain. The law provides that on the filing
274 of the petition for a writ of error, the citation, and the copy of the writ in the clerk's office of the court whose action is to be reviewed, the writ shall operate as a supersedias and stay all execution. The very object of this matter is to keep that fund from being tied up. The writ of error was obtained simply to test the question of Mr. Stateler's election. The assignment of errors is attached to the second order to show cause.

Mr. KNAPP: If your honor please——

The COURT: Wait a moment. I do not want to begin on another argument. Who are the parties in that case? I suppose all the parties are the same all the way through.

Mr. MITCHELL: No; they have changed them. In the original case in the superior court the parties were John Chetwood, Jr., plaintiff; The California National Bank of San Francisco, a corporation, S. P. Young, receiver, R. P. Thomas, R. R. Thompson, and Robert A. Wilson, defendants. That was the condition on the appeal to the supreme court, Thomas appealing from the judgment, Stateler from the order of July 8th, refusing to turn the fund over to him. To get the writ of error out this is the way it was done. The title of the case, on Thomas' writ of error, is "The California National Bank of San Francisco, a corporation, plaintiff in error, against R. P. Thomas and John Chetwood, Jr., defendants in error." On the Stateler writ of error it is entitled this way: "The California National Bank of San Francisco and John Chetwood, Jr., plaintiffs

in error, against T. K. Stateler, agent (he is made a party to the
275 suit now for the first time), S. P. Young, Richard P. Thomas, R. R. Thompson, and Robert A. Wilson, defendants in error." The injunction says there shall be no further litigation, yet they made Stateler a party in the very face of the injunction.

Mr. KNAPP: Here is the second writ of error and the first citation. On the first citation we have endorsed an application to amend.

Mr. MITCHELL: This is the first time that Mr. Stateler was made a party to any action. He was not a party to the suit before; never was made a party, never succeeded Mr. Young, never substituted. This is the title of the case in the supreme court of the State of California (handing book to the court).

Mr. KNAPP: May I call your honor's attention to the writ of error itself? I think your honor will see that that case can be continued in the name of Mr. Chetwood alone and leave the bank out. (Counsel reads.)

The COURT: The trouble I see now is this: That in these injunction proceedings here Mr. Chetwood was commanded to refrain from interfering in the matter of the distribution of this money. The injunction is as follows: "The respondent Chetwood is restrained and enjoined from commencing any further suits to collect any outstanding debt due said bank, whether the same be evidenced by open accounts, bills, notes, or judgments or otherwise, or from in any way whatever taking or attempting to take any control or possession of any of the funds or assets or property of the said bank, and from settling and allowing or attempting to settle or
276 allow any attorneys' charges or any other fees, expenses, or costs growing out of or which it may be claimed grew out of any past litigation in this matter."

I have already determined that the respondents cannot have any allowance made out of that fund in the superior court; that fund properly belongs here. It seems to me that if I allow Chetwood to prosecute this writ of error I practically set aside and contradict the other order that the respondents shall do nothing with it—that is to say, if I should hold that they should not prosecute that case simply in the name of the bank I would allow them to go on with that case to the supreme court, although I have already in these other proceedings indicated that they should have nothing to do with it. If I am going to be consistent, if my first order is properly founded on the jurisdiction of the court, it ought certainly to restrain the respondent from prosecuting that suit at all.

Mr. MITCHELL: Is your honor aware that they ask to have it adjudged by the supreme court that this money shall not come to your honor's receiver?

The COURT: That is the point.

Mr. MITCHELL: It sets the injunction aside, and all this work of months will have been for nothing.

The COURT: My opinion is that the respondents will have to abandon the writ of error in the Stateler case.

The judgment of the court is that Mr. Knapp has been guilty of

contempt of court in the Stateler case in taking the writ of
277 error, but in view of all the matters that have been set forth, and in view of the representations that have been made that he misunderstood that concluding clause, the judgment of the court is that he pay the costs of these proceedings.

I will call attention to the fact that in one of these cases there is a form of order, which might be well followed in this case, which goes a little further than the contempt. It indicates what the respondents must further do.

Mr. MITCHELL: In the Tyler case?

The COURT: Yes. The judgment of the court is that Mr. Chetwood, the respondent, has been guilty of contempt of court in the two matters involved in the second case, and that with respect to that, in view of all the matters that are presented here, he will be required to pay the costs of these proceedings.

In regard to the first case, that commends itself a little more to the favorable consideration of the court, as Mr. Chetwood has indicated that he withdrew the proceedings a few days after the court refused to modify the injunction. Still it was a technical contempt of court. I ought to say that Mr. Chetwood came to me apparently in good faith and asked me the meaning of the order. Upon being informed he went immediately out to the superior court, and appears to have withdrawn the application, so that that is merely a technical violation of the order of the court.

Mr. MITCHELL: Your honor's order will be that Mr. Chetwood is guilty, both as to the first and second order to show cause, and sentenced to pay the costs of the proceedings?

278 The COURT: Yes.

Mr. MITCHELL: They amount to nothing. It is only a technical matter, anyhow. All I have desired in this matter was to have your honor do just what you have done; to have this fund brought to this court and distributed, and have the litigation in reference to that fund ended. As regards the fight between Mr. Chetwood and Mr. Thomas, that can go on for the balance of the generation. I understand that your honor says they shall not use the name of the bank, even in that matter, because it is a violation of the injunction. In preparing this order, which your honor has signified is the judgment of this court, I will follow the Tyler case and the Rhode Island case which I read yesterday. It will be ordered that this writ of error be dismissed. I ask that your honor follow closely that decision in the Rhode Island case, and give them a definite time in which to dismiss it, because until that writ of error is dismissed I cannot get any action from the State court as to the funds.

The COURT: I will make it twenty days.

Mr. KNAPP: It can hardly be done in so short a time. The record must be sent there.

Mr. MITCHELL: It can be dismissed today. The authorities are all one way on that. They do not have to wait until the record is filed in the clerk's office to dismiss the writ of error. Mr. Foster, in his practice, sets down how that is done.

The COURT: I will give them twenty days.

Mr. MITCHELL: Within that time will your honor require
279 them to produce the evidence of that dismissal to your honor?

The COURT: Twenty days.

Mr. KNAPP: Twenty days in which to make the dismissal?

The COURT: No; to produce the evidence of it.

Mr. KNAPP: We will have ten days after that, or five days, anyway.

Mr. MITCHELL: Why cannot it be dismissed now, and then give them twenty days to produce the evidence of it?

The COURT: I will not require them to do that now, but they must dismiss it, and in twenty days produce the evidence of it.

Mr. MITCHELL: The order will so specify?

The COURT: Yes.

Mr. MITCHELL: Both these gentlemen are officers of this court. I suppose it is distinctly understood that when this proceeding is dismissed and an application made to the superior court of the State there will be no further obstacle thrown in the way of turning this money over to your honor's receiver?

The COURT: I do not know that I can go any further than I have. You can endeavor to get them to agree that they will behave themselves, perhaps. In the second proceeding Mr. Holt has not been served, I understand.

Mr. MITCHELL: It can be dismissed as to Mr. Holt. There is an order to show cause, returnable yesterday, and continued until today.

The COURT: That is withdrawn, I understand.

Mr. KNAPP: Yes; mainly because Mr. Thompson repudiated it.

The COURT: That ends that.

280 "EXHIBIT 18."

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

The affidavit of Thomas K. Stateler, the complainant in the above-entitled action, having been duly presented to this court on the 16th day of October, 1896, and it appearing therefrom that it was proper and necessary that an order should be issued requiring the parties therein named to show cause before this court why they should not be adjudged guilty of contempt of this court for the commission of the acts set forth in said affidavit, and, on motion of the attorneys for said complainant, an order having on said last-named date been duly made herein requiring the defendant John Chetwood, Jr., and his attorneys, Thompson & Thompson, and his

counsel, E. G. Knapp, to be and appear before this court on the 20th day of October, 1896, then and there to show cause, if any they had, why they should not be adjudged guilty of contempt of this
281 court for the commission of the acts in said affidavit set forth, and said order to show cause having been on said date duly served at the city and county of San Francisco, in the State of California, upon the defendant John Chetwood, Jr., and upon the said E. G. Knapp and upon A. W. Thompson, of the said firm of Thompson & Thompson, and thereafter and on the 20th day of October, 1896, said order to show cause having been duly and regularly continued until the 27th day of October, 1896; and thereafter and on said last-named date said order to show cause having been duly and regularly continued to November 10th, 1896; and thereafter and on said last-named date said order to show cause having been duly and regularly continued to the 18th day of November, 1896, when the hearing of said order to show cause was begun, Messrs. Pierson & Mitchell and Robert A. Friedrich appearing as solicitors for the complainant, and Messrs. Reddy, Campbell & Metson appearing for the said E. G. Knapp, and the said John Chetwood, Jr., and A. W. Thompson appearing in their own proper person, whereupon the hearing of said order to show cause was continued until the 19th day of November, 1896, at the hour of eleven (11) o'clock a. m., on which last-named date the hearing of said order to show cause was resumed, and the same, being fully heard, was submitted to the court for decision, and the court being fully advised in the premises:

It is now ordered that said order to show cause be, and the same is hereby, discharged as to A. W. Thompson and E. G. Knapp, who are respectively adjudged not guilty of contempt of this
282 court; that the said John Chetwood, Jr., be, and he is hereby, adjudged guilty of contempt of this court and is sentenced to pay the costs of this proceeding.

Dated November 19th, 1896.

WM. W. MORROW, *Judge.*

283 "EXHIBIT 19."

In the Circuit Court of the United States, Ninth Circuit and Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

An order having been duly made herein on the 6th day of November, 1896, upon the affidavit of the complainant and on motion of his solicitors, requiring the defendant John Chetwood, Jr., and E. G. Knapp, A. W. Thompson, W. K. Vanderslice, and Charles H. Holt to be and appear before this court on the 10th day of November, 1896, at eleven (11) o'clock a. m., then and there to show cause,

if any they had, why they should not be adjudged guilty of contempt of this court for disobeying the injunction heretofore issued by this court in this action and referred to in said affidavit; and thereafter and prior to the 10th day of November, 1896, said order to show cause having been duly and regularly served upon said defendant, John Chetwood, Jr., and upon said E. G. Knapp, A. W. Thompson, and W. K. Vanderslice; and thereafter and on
284 the 10th day of November, 1896, said order to show cause having been duly and regularly continued until the 18th day of November, 1896; and thereafter and on the 18th day of November, 1896, the hearing of said order to show cause having begun, Messrs. Pierson & Mitchell and Robert A. Friedrich appearing as counsel for the complainant, the said defendant, John Chetwood, Jr., appearing in his own behalf and as counsel for the said W. K. Vanderslice; Messrs. Reddy, Campbell & Metson appearing as counsel for the said E. G. Knapp, and the said A. W. Thompson appearing in his own behalf, and said hearing not being completed on that day, but having been continued to the 19th day of November, 1896; and thereafter and on the 19th day of November, 1896, the hearing of said order to show cause having been resumed and completed and submitted to this court for decision, and the court being now fully advised in the premises—

It is now ordered and adjudged:

1st.

That the said A. W. Thompson is not guilty of any contempt of this court in and about the matters referred to in said order to show cause, and that said order to show cause be, and the same is hereby, discharged as to the said A. W. Thompson.

2nd.

That the said W. K. Vanderslice is not guilty of any contempt of this court in and about the matters referred to in said order to show cause, and that said order to show cause be, and the
285 same is hereby, discharged as to the said W. K. Vanderslice.

3rd.

That at the time of applying for a writ of error to the Supreme Court of the United States, in the name of the defendant bank, to review the action of the supreme court of the State of California in reversing the judgment recovered by John Chetwood, Jr., in the superior court of the city and county of San Francisco, State of California, against Richard P. Thomas in the action of John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, the said E. G. Knapp was ignorant of the fact that an injunction had issued out of this court in this case on the 24th day of February, 1896, enjoining the defendants herein and their attorneys from using the name of the bank in any of the litigation referred to in the amended bill in this action, and that by reason thereof the said E. G. Knapp is not guilty of any contempt

of this court in applying for said writ of error, and that said order to show cause, as regards the action of the said E. G. Knapp in applying for said writ of error, is hereby discharged as to the said E. G. Knapp.

4th.

That at the time of applying for a writ of error to the Supreme Court of the United States, in the name of the defendant bank and John Chetwood, Jr., the defendants here, to review the action of the supreme court of the State of California upon the appeal taken by the complainant here from an order of the superior court of the city and county of San Francisco, State of California, in the action
286 of John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, made by said superior court on the 8th day of July, 1895, refusing to turn over to the complainant here, as the agent of the bank, a certain fund of money on deposit in said superior court to the credit of said action, and which said fund then belonged and now belongs to said bank and which said fund the complainant here, as the agent of said bank, was then entitled and is now entitled to receive and have in his custody, to the end that it may be distributed among the shareholders of said bank under the advice and direction of this court, as provided by law, and which said writ of error was applied for and obtained for the purpose of raising in that action the question of the validity of the election and qualification of the complainant as the agent of said defendant bank and for the purpose of preventing said fund from coming into the hands of the complainant as agent of said bank, so that it might be used by the said defendant, John Chetwood, Jr., for attorneys' fees and costs incurred by him in the litigation referred to in the amended bill herein and in prosecuting the writ of error referred to in paragraph 3rd hereof, the said E. G. Knapp well knew that an injunction had duly issued out of this court in this action on the 24th day of February, 1896, enjoining the defendants herein and their attorneys from any further litigation in and about said fund outside the supreme court of the State of California and from using the name of the bank in any further litigation in and about said fund or the matters referred to in the amended bill herein,
287 and well knew that it had been adjudged by this court in this action that this court had the sole and exclusive jurisdiction over the matter of winding up said defendant national bank and had the sole and exclusive jurisdiction over the question as to whether or not said complainant was the duly elected and qualified agent of said bank, and that in applying for said last-named writ of error the said E. G. Knapp has been guilty of a contempt of this court.

5th.

That the applications for both of the writs of error, hereinbefore referred to, were made by the said E. G. Knapp, claiming to be counsel for said bank; that the said E. G. Knapp did not then represent and never has at any of the times herein referred to represented said bank as its attorney, and did not then and never has

had authority to make either of said applications in its name, and that both of said applications were made by the said E. G. Knapp at the instance and request and with the full knowledge and approval of the defendant John Chetwood, Jr., and that in making both of said applications the said defendant, John Chetwood, Jr., has been guilty of a contempt of this court.

6th.

It is further ordered and adjudged that the defendant John Chetwood, Jr., and said E. G. Knapp pay the costs of this proceeding, and that in prosecuting the writ of error referred to in paragraph 3rd hereof and which said writ of error was obtained in the name of the defendant bank they altogether refrain from further using the name of said bank, and they are hereby forbidden to use
288 the name of said bank in any way, manner, or form in the further prosecution of said writ of error.

7th.

It is further ordered and adjudged that the defendants herein and E. G. Knapp, the attorney for said defendants, dismiss in the Supreme Court of the United States the writ of error referred to in paragraph 4th hereof, obtained from the chief justice of the State of California to review the action of the supreme court of the State of California on the appeal of Thomas K. Stateler, complainant herein, from the order made on the 8th day of July, 1895, by the superior court of the city and county of San Francisco, State of California, in the action entitled John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, and which said writ of error was made returnable before the Supreme Court of the United States on the 15th day of December, 1896, and which said proceeding in said Supreme Court of the United States is entitled "The California National Bank of San Francisco and John Chetwood, Jr., representative stockholder thereof, plaintiffs in error, *vs.* T. K. Stateler (agent), S. P. Young (receiver), Robert A. Wilson, Richard R. Thompson, and Richard P. Thomas, defendants in error;" that said writ of error be dismissed free of all cost to said complainant, and that the defendants herein have and produce evidence of the dismissal thereof before this court within twenty (20) days from the date hereof.

Dated November 19th, 1896.

WM. W. MORROW, *Judge.*

Endorsed on cover: In the Supreme Court of the United States. In the matter of John Chetwood, Jr. Return to order to show cause of December 7, 1896.

165
165-443

JAN 11 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

Ex parte In the Matter of John Chetwood, Jr.,
PETITIONER.

No. 7.
Original.

BRIEF FOR PETITIONER.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Petitioner.

ROBERT RAE,
Of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

had authority to make either of said applications in its name, and that both of said applications were made by the said E. G. Knapp at the instance and request and with the full knowledge and approval of the defendant John Chetwood, Jr., and that in making both of said applications the said defendant, John Chetwood, Jr., has been guilty of a contempt of this court.

6th.

It is further ordered and adjudged that the defendant John Chetwood, Jr., and said E. G. Knapp pay the costs of this proceeding, and that in prosecuting the writ of error referred to in paragraph 3rd hereof and which said writ of error was obtained in the name of the defendant bank, they altogether refrain from further using
288 the name of said bank, and they are hereby forbidden to use the name of said bank in any way, manner, or form in the further prosecution of said writ of error.

7th.

It is further ordered and adjudged that the defendants herein and E. G. Knapp, the attorney for said defendants, dismiss in the Supreme Court of the United States the writ of error referred to in paragraph 4th hereof, obtained from the chief justice of the State of California to review the action of the supreme court of the State of California on the appeal of Thomas K. Stateler, complainant herein, from the order made on the 8th day of July, 1895, by the superior court of the city and county of San Francisco, State of California, in the action entitled John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, and which said writ of error was made returnable before the Supreme Court of the United States on the 15th day of December, 1896, and which said proceeding in said Supreme Court of the United States is entitled "The California National Bank of San Francisco and John Chetwood, Jr., representative stockholder thereof, plaintiffs in error, *vs.* T. K. Stateler (agent), S. P. Young (receiver), Robert A. Wilson, Richard R. Thompson, and Richard P. Thomas, defendants in error;" that said writ of error be dismissed free of all cost to said complainant, and that the defendants herein have and produce evidence of the dismissal thereof before this court within twenty (20) days from the date hereof.

Dated November 19th, 1896.

WM. W. MORROW, *Judge.*

Endorsed on cover: In the Supreme Court of the United States. In the matter of John Chetwood, Jr. Return to order to show cause of December 7, 1896.

165-443

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 7. ORIGINAL.

EX PARTE IN THE MATTER OF JOHN CHETWOOD, JR., PETITIONER.

BRIEF FOR PETITIONER.

STATEMENT.

Petitioner denies jurisdiction of, and prays affirmative relief herein from the orders of, the U. S. Circuit Court for the Northern District of California commanding him—

1. To further refrain from using the name of the California National Bank of San Francisco in the further prosecution of the cause lately docketed in this Court on writ of error from the Supreme Court of California, entitled No. 673, the California National Bank of San Francisco, plaintiff in error, *v.* Richard P. Thomas.

2. To dismiss the writ of error in the cause lately docketed in this Court from the Supreme Court of California, entitled No. 674, the California National Bank of San Francisco and John Chetwood, Jr., as representative

stockholder therein, plaintiffs in error, *v.* T. K. Stateler, S. P. Young, Richard P. Thomas *et al.*

3. And adjudging petitioner guilty of contempt (1) in suing out said writs of error, and (2) in applying to the State Court wherein the litigation now here pending originated for an allowance from the fund therein for the purpose of prosecuting the writ of error in said cause No. 673.

Thereon rule was laid December 7, 1896, returnable January 4, 1897, upon said Court and honorable W. W. Morrow, judge thereof, R. P. Thomas, and T. K. Stateler, to show cause why the prayer of petitioner should not be granted. Return thereto is made solely by District Judge Morrow. Such formal return does not inform this Court why the orders complained of by petitioner were entered, but exhibits are attached thereto comprising a record of 140 printed pages, examination whereof it is apparently *assumed* will disclose the reasons therefor.

From such petition, the exhibits attached to such return, and the transcripts in the causes above named, now docketed in this Court, the following material facts appear:

1. In October, 1886, the California National Bank of San Francisco was organized under the National banking laws with a paid-up capital stock of $200,000, whereof petitioner subscribed and paid for and still holds twenty shares, of the par value of $100 each.

2. In December, 1888, said Bank became insolvent, and the Comptroller of the Currency, on January 14, 1889, appointed one S. P. Young, Receiver thereof.

July 19, 1890, petitioner, as plaintiff, began a suit in equity in the Superior Court of the City and County of San Francisco against the Bank, Richard P. Thomas, Robt. R. Thompson, Robert A. Wilson, and S. P. Young

as Receiver, "and therein and thereby, on behalf of said "Bank and himself as a representative stockholder therein, "specially set up and claimed the right to hold said de- "fendants Thomas, Thompson, and Wilson, as officers "and trustees and directors of said Bank, accountable to "it in equity, under and in pursuance of the statutes and "laws of the United States, for sundry breaches of their "trust as such officers, directors, and trustees." (Petition, p. 3.)

4. The said Thomas was the President, and, with the said Thompson and Wilson, formed the Executive Committee of the Board of Directors of said Bank. The complaint in said action set forth the By-Laws, made part of the articles of incorporation of said Bank, with respect to the separate duties and liabilities of the President and such Executive Committee, and charged gross negligence against each of them in discharge thereof, whereby the Bank, through the fraudulent acts of its Cashier in making excessive and unsecured loans and advances, was rendered insolvent. Wherefore petitioner, as plaintiff, prayed a "joint and several money judgment against them, "the said Richard P. Thomas, Robert R. Thompson, and "Robert A. Wilson, for the sum of $400,000, with legal "interest thereon from the time of such loss, and costs, "herein be rendered and entered by this Court in this "case in favor of said corporation the California National "Bank of San Francisco, and that said corporation and "this plaintiff do have such further order, decree, judg- "ment, and relief as may be meet and agreeable to equity." (Transcript No. 673.)

5. Such complaint also averred that petitioner had, prior to commencement of such suit, severally requested the officers of the Bank—the Receiver thereof and the Comptroller of the Currency—to bring and prosecute same

against said delinquent officials, which requests were refused. (Transcript No. 673.) And this fact was made part of the findings of the trial Court therein as follows:

"The plaintiff herein, prior to the commencement of this "action, in due form requested said corporation, its Board "of Directors, the said Receiver appointed to take charge "of said insolvent Bank, and the Comptroller of the Cur- "rency for said corporation to bring suit against the said "Executive Committee and the several members thereof, "the above-named defendant herein, for the amount of "money which the said corporation lost by reason of the "failure of said Bank, resulting from the negligence of "said Committee and its members; and the said corpora- "tion, its Board of Directors, the said Receiver and Comp- "troller each and all refused to bring any suit or legal "proceedings in the premises; no action other than this "present one has been brought in the premises, and there- "fore plaintiff herein, for the benefit of the corporation, "brought and he has duly prosecuted this action." (Transcript No. 673.)

And the petition avers that the Receiver "never au- "thorized nor aided in the prosecution of said suit." * * * (P. 7.) *Contra* as shown by petitioner's affidavit. (Return to Rule, p. 55.) "The Receiver, when so made "a defendant and as such served with process, answered "and followed his refusal to bring the suit by opposition "and hostility thereto. He never changed his attitude of "or abandoned his hostility thereunto, but he did waive "service on him of notices and other papers in the suit "after issue was joined therein."

The trial Court further found (Transcript No. 673):

"In the bringing and conduct thereof, the said plaintiff "has, personally, without aid from any of the other "stockholders, borne the entire labor and expenses and "costs of this suit; and the plaintiff herein employed.

" and furnished the requisite attorneys, counsel and cler-
" ical assistance therefor, and has paid all the expenses,
" costs, and charges of depositions, notaries, and clerks'
" fees, and done all matters necessary and proper in
" bringing, presenting, and trying this case, and is entitled
" to a reasonable and proper amount of reimbursement
" and remuneration for his said time, labor, and expendi-
" tures in the premises, and for his liability incurred to
" counsel and attorneys for and in behalf of the corpora-
" tion and the said stockholders thereof."

6. April 27, 1894, the trial Court ordered judgment in favor of the plaintiff against Thomas, Thompson, and Wilson, but finding the testimony unsatisfactory wherefrom to determine the amount for which judgment should be entered, reference was made to a referee to examine and report. (Petition, p. 3.)

7. Such referee reported to the Court a total loss of $166,919 suffered by the Bank by reason of the acts and omissions of said defendants, but not the amount for which each was severally responsible. Later, defendants Thompson and Wilson paid into Court to the credit of the action $27,500, whereupon the Court made an order dismissing them from the suit, and thereafter, on November 20, 1894, rendered judgment for the plaintiff—for the use and benefit of the Bank—against Thomas for $139,419, with interest at 7% per annum from December 15, 1888, being for the sum of $166,919, reported by the referee, less the $27,500 so paid by Thompson and Wilson. (Petition, pp. 4–5.)

7. Thomas appealed from said judgment, whereon the Supreme Court of California held that the dismissal of Thompson and Wilson, *supra*, was a retraxit by plaintiff and operated in law as a full satisfaction of the cause of action pleaded, upon which ground it reversed the judgment against Thomas and entered a personal judgment

against Chetwood for costs, &c. To review that judgment writ of error in cause No. 673 has been here sued out. (Petition, pp. 4–6.)

8. The Receiver of the Bank never authorized nor aided in the prosecution of this suit, nor claimed nor attempted to take control or possession of said suit nor the judgment entered thereon, nor any part of the $27,500 paid into the State Court by Thompson and Wilson. (Petition, p. 7.)

9. While petitioner was thus prosecuting this suit, the Comptroller of the Currency, by July, 1894, had paid all the creditors of the Bank whose claims had been proven or allowed—except shareholders who may have been creditors of the Bank—together with all expenses of the receivership, and the redemption of the Bank's notes having been provided for by deposit of lawful money therefor with the U. S. Treasurer, a meeting of the stockholders of the Bank was called pursuant to the Act of August 23, 1892 (27 Stats., p. 345), whereat said Thomas caused 1,020 shares owned and controlled by him and being a majority of the shares of said Bank to be cast for one T. K. Stateler, who was thereupon declared elected (against the protest of Chetwood, Jr., in the name of Annie E. Blakeslee, Respt.'s Exhibit A, p. 48) as agent of the Bank to succeed the Receiver Young in the settlement of its affairs, to whom, on February 26, 1895, the Comptroller and the Receiver executed an assignment of all assets of said Bank then in their hands or subject to their order and control. (Petition, pp. 7–8.)

10. Whereupon, on March 19, 1895 (and pending the appeal of Thomas in the State Supreme Court), said Agent Stateler voluntarily appeared in the State trial Court in the said suit brought by petitioner therein and, submitting himself to the jurisdiction thereof, moved for an order

directing that the balance of said fund of $27,500, then remaining in said Court, be paid over to him; that petitioner resisted said motion for the reasons assigned in the petition (p. 9): (1) that the Bank, as a corporation, still existed, with consequent right to manage its own affairs, and (2) that the appointment of an agent unlawfully deprived it and the shareholders of their property and funds therein without due process of law; that said Court denied said motion, whereupon said Stateler appealed to the State Supreme Court, which reversed said order and directed that said fund be paid over to him. (Petition, pp. 8–10.)

9. That thereupon petitioner sued out a writ of error to this Court operating as a supersedeas (petition, pp. 10–11), which is the cause No. 674 now pending herein as above described. (Petition, pp. 10–11).

The errors assigned in support thereof appear in the return (pp. 11–15).

10. That while both the appeals of said Thomas and said Stateler were pending in the State Supreme Court and undetermined—to wit, January 4, 1896—said Stateler, a citizen of California, filed an original bill in the U. S. Circuit Court against the Bank and the petitioner, alleging that he had the sole power to act for the Bank and its shareholders to the permanent exclusion of all stockholders or directors or officers thereof and praying an injunction against said defendants' attempt to so act in any manner. (Petition, pp. 11–12. Return, pp. 19–45 and 107.)

11. That thereon and while said appeals were still pending, undetermined, in the State Supreme Court, the U. S. Circuit Court, on February 24, 1896, granted such writ of injunction restraining the Bank, its officers, directors or employees, or this petitioner, from commencing any further litigation against said Stateler or any *further* suits

to collect any assets of the Bank, or taking any control of such assets, and from settling or allowing, or attempting so to do, any attorney's charges, or fees, expenses, or costs growing out of any past litigation, but with proviso that the "defendants are not hereby enjoined from pros- "ecuting or defending to final determination any actions "in this matter now pending in the Supreme Court of "the State of California, or in this Court." (Petition, pp. 12-13. Return, pp. 94, 95.)

12. That about Oct. 26, 1890, petitioner gave notice and attempted to move in the State trial Court for an allowance for necessary costs involved in suing out the writ of error to review the judgment of the State Supreme Court relieving said Thomas from the judgment of $139,419, recovered against him for the benefit of the Bank; whereupon said Stateler moved in the U. S. Circuit Court to punish petitioner and his counsel for so doing, and a few days later moved for further order punishing petitioner and his counsel for being concerned in suing out each of the writs of error in said causes Nos. 673 and 674 on the docket of this Court. (Petition, pp. 14, 15.) Whereon said Circuit Court held petitioner guilty of contempt in each matter, and entered orders accordingly, requiring petitioner (1) to cease from further use of the name of the Bank in prosecuting the writ of error to this Court to review the judgment of the State Supreme Court in favor of Thomas, and (2) compelling petitioner to dismiss the writ of error sued out to review the judgment of said Court in favor of said Thomas and *inter alia* against said Chetwood, Jr., holding that whatever should remain of the fund now in said cause, after paying off such sum as the Court below should award said Chetwood, Jr., to reimburse him for his expenses, &c., should be paid over to said Stateler. (Petition, pp. 14; Return, pp. 136, 137.)

13. That to determine by direct action the validity of the election of said Agent Stateler, and to what extent, if any, said agent could lawfully control the litigation thus commenced and prosecuted by petitioner, this petitioner filed a bill in the said U. S. Circuit Court in the name of said Bank and this petitioner against said Stateler, which suit is still pending and undetermined therein.

14. That petitioner and his counsel, E. G. Knapp, are authorized to appear on behalf of the Bank, and have been employed by the President and Vice-President thereof, and stockholders therein, to prosecute the writ of error now pending in this Court. (Petition, p. 16.) Appended to the petition is the affidavit of W. K. Vanderslice, as President of the Bank, showing such authority in said Knapp.

The foregoing facts are deemed sufficient to fully advise the Court of the status of affairs. We purposely exclude therefrom the allegations made upon each side challenging the good faith of the other, and seek to argue the case solely upon conceded record facts and the single question of jurisdiction of the United States Circuit Court to enter the orders complained of, which is properly raised thereon.

ARGUMENT.

I.

This Court has power to issue the writ of mandamus in a case when it is necessary so to do to preserve the free exercise of its jurisdiction in some matter before it and where an inferior Court is attempting to interfere therewith by commanding dismissal of the writ of error on the appeal or otherwise.

This doctrine is well settled.

Ex parte Crane, 5 Pet. 190.

Ex parte Bradley, 7 Wall. 364, wherein (p. 375) this Court quotes with approval the language of Blackstone, 3 Commentaries 111, who in speaking to the writ declares that the Court of Kings Bench may control the lower tribunals "not only by restraining *their excesses* but also "by quickening their negligence and obviating the denial "of justice."

And the Court's decision in the case cited also observes (p. 378): "The same principle is also found stated with "much fullness in Bacon's Abridgment, title 'Mandamus,' "'to restrain them (inferior courts) within their bounds, "'and compel them to execute their jurisdiction, whether "'such jurisdiction arise by charter, &c., being in *sub-*"'*sidium justiciæ*.'"

See also—

People *v.* Turner, 1 Cal. 143, 152, 188, 190.

Ex parte Field, *ib.* 187.

II.

Both the Comptroller of the Currency and the Receiver, as well as the then officers of the Bank, having refused to sue Thomas, Thompson, and Wilson for breach of trust in discharge of their duty, the petitioner as a stockholder of said Bank had the undoubted right to bring such action on behalf of the corporation and for the benefit of himself and the other stockholders thereof. This is precisely the form in which the action was brought in the State Court, for the amended bill of complaint herein avers that "the "plaintiff herein individually, and as the representative "of all the stockholders of the corporation, the California "National Bank of San Francisco, for the benefit of the "said corporation files this bill of complaint herein and "alleges" (Transcript No. 673), and the complaint prays

a judgment in favor of the Bank. (*Ibid.*) The allegation of the complaint that neither the Bank's officers or directors, nor the Receiver, nor the Comptroller, would on demand bring this suit, is amply sustained by the finding of fact of the trial Court. (Par. 5, *supra.*) Hence it is clear that the suit of petitioner was rightfully and properly instituted.

Morawetz on Private Corporations, Secs. 238, 244.

And the right to bring such suit in present case is put beyond question by reason of the fact that it was to recover for the wrongful acts of the managing agents of the corporation. Nelson Burrows 9 Gabb. N.C. 280 Brinckhoff v Bostwick 88 N.Y. 52

"Under these circumstances a shareholder can base his "claim to the assistance of the courts of equity upon a "common ground of equity jurisdiction; namely, that the "complainant's equitable rights have been infringed, and "that no other remedy is available."

Morawetz on Private Corporations, Sec. 245.

The authority of the petitioner to bring this suit was never challenged by the Receiver nor by his alleged successor, Stateler, as agent of the Bank. *Contra*, the entire substance of this litigation rests upon control of the fruits thereof, which have been created solely by petitioner's efforts against the hostility of the Receiver and the present hostility of Agent Stateler.

The writs of error now pending in this Court have removed hereto this original suit in the State Court. It is obvious, therefore, that this Court alone has jurisdiction over *that* case, and all questions affecting its prosecution here are properly within the sole control of this Court. It is also obvious that no order could be entered by the United States Circuit Court attempting to dismiss these writs of error nor to control their prosecution

here. This has been sought to be done only indirectly, however, by the orders herein complained of. We refrain from discussing any question involved in the merits of the case as presented by the writs of error herein, or the jurisdiction of this Court thereover. Such questions have obviously no proper application to the pending petition and rule. The rules of this Court afford ample and speedy method whereby all such questions of jurisdiction may be raised and determined. The sole pertinent questions to which the present proceeding must be confined are:

Has the United States Circuit Court jurisdiction over the petitioner whereby it may compel him to obey its orders, (1) commanding him to desist from using the name of the Bank on the writ of error in the original case against Thomas, and (2) to dismiss absolutely the writ of error in the case involving Stateler's effort to obtain control of the funds.

II.

The return hereto contends (pp. 121, 136) that the sole ground on which the U. S. Circuit Court assumes such jurisdiction rests upon the assumption that Agent Stateler is an officer of the Court, and that hence the Federal Court has sole jurisdiction over all litigation affecting the concerns of this Bank. This theory is made evident by the language of the opinion, at pp. 129–130, wherein are cited the decisions of this Court affirming the familiar rule that the receiver of a Court can be sued only by leave of the Court by whom he is appointed. We do not challenge the doctrine of these cases, for they establish the undoubted law. But we do earnestly contend, what is *prima facie* obvious, that the case is in no sense, either in fact or law, within the principle of such decisions.

Whenever a court of equity takes possession of the property of a corporation or individual, and appoints its own officer as its receiver or agent, charged with its care and administration, it is obvious that the court thus taking the property into judicial possession must retain its exclusive management and control.

But in present case the U. S. Circuit Court has never at any time had the assets and property of this Bank in its possession, nor could it do so; nor was the Receiver, in the first instance, nor his successor, the agent, appointed by the Court.

The *National Banking Act* (U. S. R. S. 5234) provides that upon refusal of any national bank to pay its circulating notes, and consequent default,—

"The Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the Court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of stockholders. Such receiver shall pay over all money so made to the Treasury of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

By Act approved June 30, 1876, the authority of the Comptroller to take possession of any national bank and appoint a receiver therefor was given whenever (*inter alia*) the Comptroller became satisfied upon examination of its affairs that the particular bank was insolvent.

It is manifest, therefore, that the receiver acts primarily and directly under the control of the Comptroller. He is in no sense an officer of any Court, Federal or State. The property in his hands and collected by him is paid over by him to the Comptroller, who disburses the fund direct to the creditors of the insolvent bank. The aid of a Court is invoked only when the receiver desires to sell or compound a bad or doubtful debt or to sell real and personal property of the bank. But the Court does not handle the funds arising therefrom nor direct the manner and form of their disbursement. All this is under the management of the receiver, and the fund is disbursed by the Comptroller direct to the creditors.

Under such conditions it is, therefore, impossible to hold that the receiver is an officer of the Court, or that the property of the bank in his charge is taken over into the control of the Court. It is only in the exceptional case named by the statute of compromise of bad or doubtful debts, or the sale of real and personal property, that resort is had to the Courts. That is done in each particular instance on petition of the receiver, and when the Court acts thereon and approves or disapproves such sale or compromise, its prescribed duty and consequent jurisdiction extends only to the particular matter in which the petition is presented, and ends with the adjudication thereof.

It is matter of daily occurrence that such petitions are presented by receivers in the Federal Courts and no case can be found wherein the statute of these special applications to the Courts thereon are held to create the receiver an officer of a court or to place the assets of the bank within the control of such Court.

In the bill filed by Agent Stateler in the U. S. Circuit Court on January 4, 1896, to enjoin the petitioner and the

Bank (return, pp. 40, 41), the averment is made that on February 21, 1889, Receiver Young filed an application in the U. S. Circuit Court entitled "*In re* application of "Receiver of the California National Bank for the sale of "personal property," and as a conclusion of law the bill asserts that thereby "the said Receiver submitted himself "and the affairs of said banking association to the juris- "diction of this honorable Court." * * *

The brief filed on behalf of respondent assumes, without argument, that thereby the U. S. Circuit Court obtained exclusive jurisdiction over the affairs of the Bank, and that as such proceedings were instituted before the commencement of the suit by the petitioner in the State Court to recover against the officers of the Bank for breach of trust, therefore the U. S. Circuit Court thereby obtained original and exclusive jurisdiction under which it has the right to control this petitioner and said Bank. This assumption is manifestly erroneous.

First. Because while the petition of said Receiver filed in the Circuit Court is not produced as part of the return to the rule, it is manifest from the plain terms of the National Banking Law that no such results followed his application to the Court for authority to sell personal property of the Bank; and

Second. The right of petitioner to bring the suit in the State Court against the officers of the Bank was never challenged or disputed on this ground, nor the petitioner sought to be restrained from prosecuting such suit therein to final determination. The suggestion is now made solely as an ~~open~~ assumed ground on which to base the claim that in point of time the U. S. Circuit Court first obtained original jurisdiction over the litigation here involved. The record demonstrates that such Court never at any time had jurisdiction thereover; the cause was never removed into

such Court nor move made to that end. Chetwood, as a citizen of California, sued the Bank and its officers, all having their *habitat* within that State, was necessarily confined to the State Court in commencing to prosecute his action. The Receiver was made a party defendant thereto, but not only took no steps to move the cause to the Federal Court, but as petitioner alleges (and the allegation is nowhere denied) such Receiver stood thereafter in hostility to said suit, and did nothing to aid in securing judgment against the officers of the Bank whose breach of trust and liability therefor was the sole foundation of the action. We ~~They~~ meet all of these contentions, therefore, with the single averment that, both as matter of fact and as matter of law, the property of the Bank was not under control of the U. S. Circuit Court; the Receiver was not an officer thereof, and his successor, Agent Stateler, stands in no different attitude with respect thereto. Hence, the attempt to draw to the U. S. Circuit Court exclusive jurisdiction in the manner suggested is no foundation on which to rest.

That the petitioner was forced to resort to the State Court is demonstrated in the case of *Whittemore* v. *Amoskeag National Bank*, 134 U. S., p. 527.

III.

But it is contended that after the decision of the Supreme Court of California in the suit brought by petitioner in the name of the Bank against Thomas, whereby the latter, upon pure technicality, escaped his just liability to the creditors and shareholders of the Bank, no right existed in petitioner to use the name of the Bank in prosecuting writ of error therefrom to this Court.

To this we answer:

The injunction order issued against petitioner by the

Circuit Court on February 24, 1896, did not enjoin petitioner or said Bank from prosecuting the writ of error to this Court. *Contra*, the concluding words of that order are :

"But the defendants are not hereby enjoined from "prosecuting or defending to final determination any ac- "tion in this matter now pending in the Supreme Court "of the State of California, or in this Court."

Hence, as matter of fact, the contention against the petitioner on this ground is erroneous.

It is equally erroneous as matter of law.

In *Bank of Bethel* v. *Pahquioque Bank* (14 Wall. 383), the Court cites at length the provisions of the Banking law with respect to the powers of the Comptroller in closing a bank on default in redeeming its circulating notes and to appoint a receiver therefor. The powers of such receiver under then existing law are substantially unchanged from those which now exist. After full recital thereof, the Court concludes (p. 398) :

"None of these proceedings, however, support the "theory that the association ceased to exist when the re- "ceiver was appointed, nor at any time before the assets "of the association are fully administered, and the bal- "ance, if any, is paid to the owners of the stock or their "legal representatives."

And, in stating the reasons for this conclusion, the Court drew particular attention to the fact that the banking association can only be declared dissolved for violation of law upon the decree of a court of the United States. The case cited covers the whole question with fullness of detail and certainty of conclusion. This conclusion is reaffirmed in—

National Bank v. *Insurance Company*, 104 U. S. 54, 73.

Rosenblatt v. *Johnston*, 104 U. S. 462, 463.

And in *Chemical Bank* v. *Hartford Deposit Company* (161 U. S. 8) all the foregoing decisions are cited with approval, the opinion therein adding (p. 7):

"It thus appears that by the terms of the statutes the corporation continues, notwithstanding the appointment of a receiver, if its corporate life has not been extinguished by lapse of time, by any provision of its articles, by any action of its stockholders, or by any judgment of forfeiture. The receiver is indeed appointed to close up the association—that is to say, wind up its business, get in its assets, and pay its debts, and, if need be, to enforce the personal liability of its shareholders for all its 'contracts, debts, and, engagements,' but the corporation lingers while this is being done, and on occasion when the Receiver has discharged his duty with the satisfactory results enumerated and assets remain, an agent may be chosen, who may sue and be sued in in the name of the association in the conduct of the final liquidation. Of course, when insolvency is declared the corporation is incapacitated from doing any new business. It has ceased to be a going concern, but it still survives for the purpose of the discharge of its liabilities and the final distribution of its remaining assets when that has been accomplished. No refinement of construction leads to any other result, and numerous decisions preclude further discussion."

The right of the petitioner to bring this original suit being undoubted, his continuing right to use the name of the Bank in its prosecution to final judgment is equally clear. If he may be lawfully restrained from using the name of the Bank as plaintiff in error in pending writ, then it is obvious that the remedy which the law gives him to bring this suit for the benefit of himself and the stockholders of the Bank is cut short by arbitrary discretion, and the resulting benefit in carrying same through to final adjudication may be wholly lost. No such rule

can be affirmed, and the petitioner's right to use the name of the Bank stands beyond question, and is certainly not within the control or restraint of the Circuit Court.

The order of the U. S. Circuit Court in directing him to discontinue the use of the name of the Bank on the pending writ of error in effect arbitrarily stops the case upon the judgment of the State Supreme Court adverse to the Bank, and would leave the Bank and its interested stockholders, if such order were lawful, wholly without further remedy.

IV.

Equally erroneous is the assertion of the Circuit Court that because Agent Stateler has been elected to succeed the Receiver by a majority vote of shares of stock owned and controlled by Thomas, whereby such Agent displaces the petitioner and the Bank in this litigation, assumes sole control thereof, and may rightfully ask that the petitioner and the Bank be enjoined from further prosecution of the case. Such an attempt creates at once direct conflict between the powers of Federal and State Courts, which has no proper existence and is wholly unnecessary. Upon the appeal of Stateler in the State Court the Supreme Court of the State has recognized his right to receive this fund. The petitioner knows, and so avers, that its distribution among the stockholders simply means that Thomas as a majority stockholder will receive the major portion thereof, although it is beyond question that upon technicality he has escaped the payment of probably $150,000 direct liability to the Bank by reason of his negligence in properly filling the duties of his office. The petitioner challenges the correctness of the decision of the Supreme Court of the State in that regard, insisting that the agent should not so control the fund, and the

question raised upon the writ of error therefrom invokes the proper exercise of jurisdiction by this Court beyond question.

The assumption of the U. S. Circuit Court that Agent Stateler can exercise this exclusive control, and can by the process of that Court enjoin the petitioner from further proceeding in the cause, rests also upon the erroneous assumption that such agent is an officer of the Circuit Court, whereby that Court has obtained exclusive jurisdiction over the matters involved. The foregoing argument on this head, with respect to the Receiver of the Bank, is fully applicable to his successor, Agent Stateler. Such agency is provided for by the Act of June 30, 1876 (19 Stats., p. 63), as amended by the Act of August 3, 1892 (27 Stats., p. 345). After the stockholders who elected him have given a bond to the Comptroller of the Currency, conditioned for the payment, etc., in full of all claims that may thereafter be allowed by a court of competent jurisdiction, he takes the authority to receive the assets and property of the Bank by transfer from the Receiver and Comptroller, and to finally settle and distribute the assets and property in his hands. In language identical with the authority conferred upon receivers he may sell, compromise, or compound debts due the association, with the consent and approval of the Federal Court, having jurisdiction in the district where the business of the Bank was carried on, and at the conclusion of his duty he is required to "render to such District or Cir- "cuit Court a full account of all his proceedings, receipts, "and expenditures as such agent, which Court shall, upon "due notice, settle and adjust such accounts and dis- "charge said agent and the sureties upon said bond."

This provision does not authorize the Federal Court to take control of a fund in any State Court, such as this,

nor does the liability of the agent under the statute extend to anything more than such assets as may actually reach his hands. His administration, of such assets, from whatever source received, is made subject to the final approval of a Federal Court. But there is neither in the language nor intention of the statute any exclusive jurisdiction vested over the property of the Bank which may come into the hands of an agent vested in a Federal Court, and certainly it could never have been the intention to give a Federal Court exclusive jurisdiction over a fund which has not come into the agent's hands. It would be very inconvenient in cases where suits might have to be instituted for its recovery beyond the jurisdiction of such Court. This suit, brought by this petitioner, commenced of necessity in a State Court, is certainly not within the jurisdiction of the Federal Court, nor does the intervention of Agent Stateler therein alter or disturb such jurisdiction. The right and power of the State Court to administer the fund cannot be controlled by the Federal Court either directly or indirectly by restraining orders issued against the petitioner or the Bank or otherwise. The agent of the Bank as a party to the cause in the State Court is subject to its jurisdiction, and whatever assets of the Bank he may receive therein become thereafter a part of the fund which must be administered subject to the final approval of the Federal Court. This is the entire sum of the case and the entire effect of the law. The contention *contra* is that the agent is entitled to receive the entire fund from the State Court without permitting that Court to make any allowance therein for costs and expenses of the litigation, and that the Federal Court must thereafter be the sole tribunal in which any allowance can be asked or given. It is carried to the extreme in the present case by holding

the petitioner guilty of contempt in daring to ask the State trial Court for a reasonable allowance with which to pay the cost of suing out and docketing in this Court the writ of error in cause 673, whereby petitioner seeks to enforce the claim of the Bank against its ex-President Thomas for the recovery of more than $150,000 for the benefit of the Bank and its stockholders. It is worthy of comment that the orders of the Circuit Court are to the point of concluding the litigation with respect to Thomas, by the final judgment of the State Supreme Court in his favor, and do not permit any effort to obtain reversal thereof with a consequent large benefit to the Bank and its stockholders. We are justified in observing that this extraordinary result is not warranted by the attempt of any Court to maintain its jurisdiction to the absolute injury of the parties for whom the agent can in the best possible view be only administering the assets of the Bank, to wit, the stockholders thereof.

If the argument submitted to support the jurisdiction of the Circuit Court in issuing the orders here complained of were sound, it would result that wherever receivers or agents of a failed National Bank sought to shield officers or directors guilty of wrong-doing or negligence, the action of such receiver or agent in a Federal Court, upon a petition for authority to sell or compound a bad debt, would instantly give complete control of all litigation affecting the bank, and thereafter exclude all interested parties from prosecuting litigation already commenced which sought to hold such officers or directors liable for their omissions or defaults, and to recover for the benefit of the stockholders thereof. To reach that result, the Court under present record must hold (1) that the Receiver and succeeding agent are both officers of the Federal Court; (2) that the assets in their hands or which

they are entitled to recover are, in fact and law, in the custody of such Federal Court, and (3) that no suit can be commenced by or for interested stockholders in the name of the Bank or otherwise to recover either indebtedness due the Bank, or damages for breach of trust by its officers or directors, unless such Receiver or agent shall consent to such suit and the same be brought in the Federal Court where such assumed exclusive jurisdiction rests. The national banking law cannot be fairly construed to reach such an extraordinary result. The decisions of this Court, or of other Federal Courts of subordinate jurisdiction cannot be tortured into establishing such a conclusion. Nor can it or ought it to be ruled that by restraining orders acting upon individuals, litigation of the character here presented may be restrained and ended to the injury of the Bank and its stockholders. It is enough to hold that the receiver or agent may be a party in the first instance, or by voluntary appearance in all such litigation wherever commenced or prosecuted, and that assets of the Bank or judgments recovered in cases similar to the one at bar, when the fruits thereof came into the hands of such receiver or agent are, in the first instance, subject to the disbursement of the Comptroller of the Currency to the creditors, and thereafter by the agent to the interested stockholders, whose accounts with respect to the receipts and disbursements are subject to the final approval of a Federal Court solely to enable such agent and the bond of the stockholders to be discharged upon the performance of the conditions imposed thereby. To go further and to recognize the jurisdiction of the U. S. Circuit Court in the case here presented, is in effect to rule that the actual parties in interest, to wit, the stockholders who are primarily liable for the debts of such insolvent Bank, and who have given such

the petitioner guilty of contempt in daring to ask the State trial Court for a reasonable allowance with which to pay the cost of suing out and docketing in this Court the writ of error in cause 673, whereby petitioner seeks to enforce the claim of the Bank against its ex-President Thomas for the recovery of more than $150,000 for the benefit of the Bank and its stockholders. It is worthy of comment that the orders of the Circuit Court are to the point of concluding the litigation with respect to Thomas, by the final judgment of the State Supreme Court in his favor, and do not permit any effort to obtain reversal thereof with a consequent large benefit to the Bank and its stockholders. We are justified in observing that this extraordinary result is not warranted by the attempt of any Court to maintain its jurisdiction to the absolute injury of the parties for whom the agent can in the best possible view be only administering the assets of the Bank, to wit, the stockholders thereof.

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bond, are without remedy save at the pleasure of the Receiver or agent and must stand helpless in invoking judicial aid against such possible wrong. The decisions of this Court *supra* clearly decide the contrary of such a proposition.

It is well established by a series of State and Federal decisions that, where a suit is first commenced in a court of competent jurisdiction, that as between the same parties and the same subject-matter, no other court having concurrent jurisdiction can take jurisdiction of it, and that in such a case, where a suit has been commenced in the Federal Court, that Court may, by an injunction, restrain the parties subsequently commencing a suit in a State Court involving the same subject-matter and between the same parties.

The petition of the statutory Receiver of the National Bank of California, under the National Banking Act, to the United States Court, to be permitted to sell certain property of the Bank, or compound certain debts (the subject-matter of the State Court suit not being embraced in such petition), is not the same suit as that pending in the United States Court between the same parties and in the same subject-matter. The Comptroller of the Currency and his Receiver though the Receiver was made a party defendant to the suit in the State Court, refused to take any part in such suit, or to institute any proceedings in any court of competent jurisdiction for the recovery of the debt or claim controverted and litigated in that suit.

Plaintiff Chetwood, Jr., was not a party to any suit pending by the Receiver in the U. S. Circuit Court. He commenced his action in the State Court upon a novel, new, and independent matter, not embraced in any antecedent litigation in any court.

The receiver in a case in which a suit subsequently commenced in a State Court which involved the same parties and subject-matter in a suit already pending in the U. S. Court, might have applied to the U. S. Circuit Court for an injunction to restrain the prosecution of the suit in the State Court. If, however, he permitted the plaintiff in such suit in the State Court to sue out a writ of error from the Supreme Court of the United States and obtain a *supersedeas*, then an application in the U. S. Circuit Court for an injunction is in effect an injunction against the party to the suit in the Supreme Court of the United States, but not in the State Court, and is wholly unauthorized.

A judge of a Circuit Court of the United States has no power to enjoin a party to a judgment in a State Court after an appeal to the Supreme Court of the United States and a supersedeas. That can only be done, if at all, by a justice of the Supreme Court.

Murray v. *Overstoltz*, 8 Fed. Rep. 110.

Every reason given to support the jurisdiction of a Circuit Court of the United States for issuing an injunction against a proceeding in a State Court is inoperative when the suit in the State Court is properly docketed with a supersedeas in the United States Supreme Court. It was well said by Mr. Justiee Field, in the case of *Sharon* v. *Terry* (36 Fed. Rep. 367): "That tribunal" (the U. S. Supreme Court) "is lifted far above all prejudices, passions, "and attachments, and will adjudge without any such in- "fluences" (local prejudices) "what is just and right in "the controversy, so far as that is attainable in our sys- "tem of government."

While the U. S. Circuit Court may restrain proceedings in a State Court of *concurrent* jurisdiction, where the Cir-

cuit Court has first obtained jurisdiction, it has no power to issue injunctions to restrain like proceedings in the Supreme Court of the United States where a suit is pending on writ of error in this Court—a Court of superior and appellate jurisdiction.

It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court. This rule is thus stated, with citation of many authorities, in *Moran* v. *Sturges*, 154 U. S. 256. And as the law looks to substance and not form, the rule would necessarily embrace in its effect all attempts by such a court to restrain it through individual process upon litigants before the court having possession of the property in question.

In case cited *supra*, the Court quotes with approval the language of Mr. Justice Grier in *Peck* v. *Jenness*, 7 How. 612, 624, that—

"The fact, therefore, that an injunction issued only to
" the parties before the court, and not to the court, is no
" evasion of the difficulties that are the necessary result of
" an attempt to exercise that power over a party who is a
" litigant in another and independent forum."

We submit the rule should be made absolute.

A. T. BRITTON,
A. B. BROWNE,
Attys. for Petitioner.

ROBERT RAE,
Of Counsel.

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Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 7, Original.

EX PARTE: IN THE MATTER OF JOHN CHETWOOD, JR., PETITIONER.

BRIEF FOR THE RESPONDENT.

ROBERT BRENT MITCHELL,
Counsel for Respondent.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 7, Original.

EX PARTE: IN THE MATTER OF JOHN CHETWOOD, JR.

BRIEF FOR THE RESPONDENT.

On the 16th day of October, 1896, the United States circuit court in and for the ninth circuit and northern district of California, in an action in equity then and now pending before it entitled "Thomas K. Stateler, complainant, *vs.* The California National Bank of San Francisco, a national bank, and John Chetwood, Jr., defendants," the bill thereon, as we shall hereafter see, being a bill in aid of jurisdiction, upon the affidavit of the complainant made its order requiring the defendant Chetwood and his attorneys to be and appear before said court on the day named in said order and show cause why they should not be adjudged guilty of contempt in disobeying an injunction *pendente lite* issued out of said court in said cause on February 24, 1896, and which said injunction, it was claimed by complainant, among other things, prohibited Chetwood and his attorneys from applying to the superior court of the city and county of San Francisco, State of California, for any further allow-

ances for counsel fees or costs out of a certain fund deposited there belonging to said bank and which fund is hereinafter more fully referred to.

Before the hearing of this order to show cause took place the complainant presented a second affidavit in said action, and the circuit court thereupon made a second order for the defendant Chetwood and his attorneys and the president and vice-president of the defendant bank to appear before said court on a day named in said order and show cause why they should not be adjudged guilty of contempt in disobeying said injunction, and which said injunction, it was claimed by complainant, among other things, prohibited the defendants and their attorneys from using the name of the California National Bank of San Francisco in any litigation whatever, and also from attempting to raise in any other court other than in said circuit court and in any other action other than the one in which said injunction was issued the question as to whether or not the complainant was the duly elected, commissioned, qualified, and acting agent of the defendant bank.

Both of these orders to show cause were heard together. Upon the hearing the complainant introduced in their support the injunction *pendente lite* which it was claimed had been disobeyed; proof of the service thereof upon the parties sought to be adjudged guilty of contempt; the papers used on the hearing of the application for the injunction *pendente lite*, viz., the order to show cause why the injunction *pendente lite* should not issue, made on the filing of the original bill; the amended bill; the return of the defendants to said order, consisting of affidavits opposing the issuance of any injunction and the rebuttal affidavits on behalf of the complainant. The complainant also introduced the papers used on the hearing of a motion of the defendant Chetwood to modify the injunction, consisting of the moving papers and the opposing affidavits; also the order denying the motion. The complainant also introduced

the answer of the defendants and the supplemental bill of complaint. On behalf of the defendants there were introduced the several affidavits of the defendant Chetwood, the respective attorneys, and the president of the bank. No service had been made on the vice-president of the bank and there was no appearance for him, and the proceedings were dismissed as to him. There was no oral evidence.

Upon the conclusion of the hearing the court made its order adjudging the defendant Chetwood guilty and his attorneys not guilty as to the matters set out in the first order to show cause, and made its further order adjudging the defendant Chetwood guilty and his attorney, A. W. Thompson, and the president and vice-president of the bank not guilty as to the matters set out in the second order to show cause. E. G. Knapp, one of Chetwood's attorneys, was adjudged guilty of contempt as to certain of the matters set out in the second order to show cause. On the first order to show cause Chetwood was sentenced to pay the costs of the proceeding, which were nominal. On the second order to show cause Chetwood and Knapp were sentenced to pay the costs of the proceeding, and were ordered to dismiss, free of all cost to the complainant, a certain writ of error sued out by Chetwood in his own name and in the name of the bank as plaintiffs in error (the said Knapp appearing as the attorney of record for said plaintiffs in error) to review the action of the supreme court of the State of California in reversing a certain order of the superior court of the city and county of San Francisco, State of California, in the suit of John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco *et al.*, defendants, hereafter fully referred to, and to refrain from using the name of said bank in the further prosecution of another writ of error sued out by the said Chetwood in the name of said bank to review in this Court the action of the supreme court of the State of California in reversing the judgment of the superior court of the city and county of San Francisco in said cause.

These orders are complained of in this Court by the said Chetwood, who in this proceeding seeks to have this Court set them aside, on the ground that the circuit court did not have jurisdiction to make the orders. An order to show cause upon the judge of the circuit court and parties in interest was issued by this Court on December 7th, served at San Francisco December 15th, and in response thereto the judge of the circuit court has presented and filed herein his return, which contains copies of all the papers used on the hearing of said orders to show cause.

The case presented to the court by the amended bill upon the hearing of the order to show cause why an injunction *pendente lite* should not issue was as follows: On the 15th day of December, 1888, the defendant in said action, The California National Bank of San Francisco, doing business at San Francisco, California, with a capital stock of $200,000, divided into 2,000 shares of the par value of $100 each, all of which was subscribed for and fully paid up prior to the commencement of business by the bank, being unable to meet its circulating notes, suspended business. On January 14, 1889, the Comptroller of the Currency of the United States, having completed a preliminary investigation of the condition of the bank through the bank examiners, and having become satisfied of the insolvency of the bank, declared the association insolvent under section 1 of an act of Congress entitled "An act authorizing the appointment of receivers of national banks and for other purposes," approved June 30, 1876. The receiver at once qualified and entered upon the duties of his office. It soon became necessary to commence the sale of assets, and on the 21st day of February, 1889, the receiver, under section 5234 of the Revised Statutes, filed a petition in said United States circuit court entitled "*In re* application of receiver of the California National bank for the sale of personal property," which said petition set forth the adjudication of insolvency by the Comptroller of the Currency, petitioner's appointment as

receiver, his qualification as such officer, and that as such receiver there had come into his possession certain personal property of the banking association, which it would be necessary to sell in order to pay the debts of the association. Thereupon, in said proceeding, the circuit court made an order authorizing the receiver to sell the property described in said petition and to apply the proceeds thereof to the expenses of the trust and the payment of the debts of the bank. The filing of said petition was a necessary step in the winding up of the affairs of said banking association; and thereafter, and prior to the date next hereinafter mentioned, the said circuit court, upon petitions filed by said receiver, made various orders in reference to the administration of said insolvent institution and the winding up of its affairs, and said receiver also instituted in said circuit court various suits to collect the moneys due to said banking association.

At the time the receiver took charge of the affairs of the bank the board of directors of the bank consisted of seven members, to wit, R. P. Thomas, its president; R. A. Wilson, its vice-president; R. R. Thompson, and four others. Thomas owned 960 shares of the stock, and Thompson and Wilson owned 625 shares. The balance of the capital stock, aggregating 415 shares, was scattered among small holders.

On July 19, 1890, eighteen months after the receiver had commenced the winding up of the affairs of the bank and while the receiver was still in office, the defendant, John Chetwood, Jr., holding twenty shares of the bank's stock, commenced a suit in the superior court of the city and county of San Francisco, State of California, entitled "John Chetwood, Jr., plaintiff, *vs.* The California National Bank of San Francisco (a corporation), Richard P. Thomas, Richard R. Thompson, Robert A. Wilson, and S. P. Young, receiver of said bank, defendants." The action was for the benefit of the corporation, to recover from the defendants Thomas, Thompson, and Wilson, as the executive committee

of the board of directors of the bank, the sum of $400,000 as damages for negligence, being the amount claimed by Chetwood to have been lost to the bank by reason of unfortunate investments made by the cashier, and which losses Chetwood claimed would not have occurred if the said three defendants in that action had properly supervised the acts of the cashier, a supervision alleged in the complaint in said action to have been imposed upon the said three defendants, as members of the executive committee of the bank, by the by-laws of the corporation, and made the corporation and the receiver parties defendant. The receiver never appeared in the action, but the bank appeared by its attorney of record and interposed a demurrer to the complaint. A stipulation was thereupon entered into and signed by the attorneys for the plaintiff Chetwood that the answer of the defendants Thompson and Wilson should stand as the answer of the defendants Thomas and the bank. The case went to trial upon this stipulation. The bank took no part in the trial nor in any of the subsequent proceedings in the cause. The trial judge rendered a written decision holding that the plaintiff was entitled to a judgment in his favor for the benefit of the corporation as against the defendants Thomas, Thompson, and Wilson for an amount equal to the actual loss to the bank, resulting from the bad investments made by the cashier, the court finding that no fraud had been committed by said three defendant directors or either of them; that none of them were guilty of any misconduct in any way connected with the matter, but that the losses were due to the fraudulent acts of the cashier in investing the funds of the bank, and, for the purpose of ascertaining the amount of the loss, appointed a referee. The report of the referee was filed in that court on August 17, 1894. It reported the loss to the bank to be $197,092.91, for which amount, under the decision of the court, it became the duty of the court to enter a judgment against the three individual defendants on motion of the plain-

tiff in the action. No such motion was ever made, but on September 24, 1894, stipulations were filed in the action, whereby the plaintiff renounced and withdrew his cause of action against the defendants Thompson and Wilson and stipulated that a judgment of dismissal should be entered accordingly. On the same day the superior court ordered the action dismissed as against Thompson and Wilson, and a judgment of dismissal was entered accordingly. The consideration for such dismissal, so far as the complainant had been able to learn, was the payment by Thompson and Wilson into said superior court of the sum of $27,500 and the deposit in the Bank of California of their holdings of the capital stock of the bank, to wit, 625 shares, and the execution of a written agreement with Chetwood to the effect that their stock should not share in any dividend that might be declared out of the said $27,500, nor in any dividend that might be declared out of the first $10,000 that might be collected on account of any judgment that might thereafter in said action be recovered against Thomas. At the time this action was dismissed against Thompson and Wilson both of them were men of large fortune, one of them being worth over a million and a half, their property consisting of real estate not exempt from execution situate in the State of California, and Chetwood had intimate knowledge of their said financial condition. The release of these two joint tort-feasors by Chetwood was made without the knowledge or consent of any of the stockholders of the bank other than himself without consultation with the receiver or the comptroller.

A few days after the payment of this money into court Chetwood appeared in the trial court and obtained an order allowing him $9,560.16 for attorneys' fees and costs in said action. No notice of this application was given to the receiver, the comptroller, or to any one interested in the fund, and it was charged in the bill that Chetwood kept

the fact of this application secret for the purpose of obtaining said order without opposition.

On November 20, 1894, findings were filed in the superior court in said action, in which it was expressly found that the actual loss to the corporation through the negligence of the three defendants was the sum of $166,919, and that $27,500 had been paid thereof by Thompson and Wilson, leaving a net loss to the bank of $139,419, for which amount a judgment was ordered entered in favor of Chetwood for the benefit of the corporation against the third tort-feasor, Richard P. Thomas. This judgment was entered against Thomas, and he appealed from the judgment on the judgment-roll alone, claiming, among other things, that, even if the complaint in the action had ever stated a cause of action against the three directors, the release of his two co-defendants was a release of himself. At the time the application for an injunction was heard the bill showed that the appeal from this judgment was pending in the supreme court of the State. The bill charged that in releasing Thompson and Wilson Chetwood had in all probability released Thomas, and thus lost to the bank its most valuable asset.

On the 4th day of January, 1895, Chetwood again appeared in the superior court and obtained an order allowing him an additional one thousand dollars out of this fund, to be spent in employing detectives and in such manner as he should see fit in his attempts to collect the judgment against Thomas.

In the spring of 1894 and prior to the report of the referee, the receiver having succeeded in paying off all the debts of the bank, the Comptroller of the Currency called a meeting of the shareholders of the bank for the purpose of having them determine whether the receiver should be continued and wind up its affairs or whether an agent should be elected for that purpose, pursuant to the provisions of an act entitled "An act to amend an act entitled 'An act au-

thorizing the appointment of receivers of national banks and for other purposes,' approved June 30, 1876, approved August 3, 1892." This act, which is still in force, provided that when the creditors of the association and the expenses of the receivership had been fully paid and the redemption of the circulating notes of the association had been provided for by the deposit of lawful money of the United States with the Treasurer of the United States, the comptroller should call a meeting of the shareholders, by giving published notice, and at such meeting the shareholders should determine whether the receiver should be continued and should wind up the affairs of the association or whether an agent should be elected for that purpose, and in so determining the shareholders should vote by ballot, in person or in proxy, each share of stock entitling the holder to one vote, and the majority of stock in value and number should be necessary to determine whether the said receiver should be continued or whether an agent should be elected. In the event that the majority of shareholders should determine that the said receiver should be continued, he should thereupon proceed and sell the remaining assets, possessing all the powers and authority and subject to all the duties and liabilities originally conferred upon him by his appointment; but in the event that a majority of the stock should determine that an agent should be elected, they should thereupon proceed to elect such agent, and the person who should receive votes representing at least a majority of the stock in value and number to be the agent for the purposes provided for by the act. The act then provides that whenever any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the comptroller, conditioned for the discharge in full of each and every claim that may thereafter be allowed and proved by and before a competent court and for the faithful performance of the trust, the comptroller and the receiver should thereupon transfer and deliver to such agent all the

undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said comptroller and said receiver, and they were specially authorized by the act to execute such deeds, assignments, or transfers or written instruments as might be proper for that purpose, and upon the execution and delivery of such instrument to said agent the said Comptroller and the said agent to be discharged from all liability to such association and to the creditors and shareholders thereof. The act then provides that upon receiving such deed, assignment, transfer, or other instrument the person elected such agent should hold, control, and dispose of the assets of the association which he might receive under the terms thereof for the benefit of the shareholders, and that he may in his own name or in the name of such association sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court should upon due notice settle and adjust said accounts and discharge said agent and the sureties upon his bond, the net proceeds to be applied, first, to the payment of the expenses of the execution of the trust; then to the repayment of any amounts paid by the shareholders as assessments levied by the comptroller, and the balance to be divided ratably among the shareholders.

At said meeting, held July 6, 1894, after the referee had been appointed to state the loss, but about six weeks before he filed his report, 1,020 out of the 2,000 shares of stock were represented. R. P. Thomas, one of the defendants in Chetwood's suit, voted the 960 shares owned by him. The

remaining 60 shares, owned in 10-share lots, were voted by their owners or their proxies. By the unanimous vote of this stock, it was decided to dispense with the services of a receiver and to elect an "agent" in his place. Thereupon, by the same vote, T. K. Stateler, a stockholder, the complainant in the action, was elected agent. Stateler qualified, as provided by law, and his bond was forwarded to the comptroller for approval. There was some delay about the bond, and it was not approved until about three months after the entry of the judgment against Thomas. On the 26th day of February, 1895, the comptroller issued the assignment to Stateler, which qualified him under the act as agent, but it did not reach Stateler at San Francisco until early in March, 1895. Thereupon the comptroller and the receiver turned over to Stateler all the assets of the bank under their control.

On the 10th day of December, 1894, some three months before Stateler received his commission as agent, Thomas had applied for the benefit of the California State insolvent laws, and had been adjudged insolvent. The schedule of debts attached to his petition set forth the judgment recovered by Chetwood, also a promissory note due the bank for about $1,880, upon which a suit brought by the receiver was pending at the time of the commencement of the insolvency proceedings, and another debt secured by a mortgage. The meeting of creditors took place in January. Chetwood presented to the court a certified copy of the judgment recovered by him, and by his own vote elected himself assignee. He thereupon qualified and was the assignee of the insolvent at the time Stateler received his commission. Upon receiving the commission, Stateler's first step was directed to preventing Thomas obtaining a discharge in insolvency. The receiver had turned over to him the $1,880 promissory note due the bank, and had substituted Stateler in his place as plaintiff in the suit he had brought upon the promissory note. A copy of this note was filed in the in-

solvency proceeding, and Stateler as a creditor appealed from the order adjudging Thomas insolvent, there being some very serious doubts as to the validity of the order of adjudication, three days having expired between the verification of the petition in insolvency and the adjudication of insolvency, the statute of the State requiring that the adjudication should take place upon the presentation of the petition. The appeal from this order prevented Thomas from obtaining his discharge, the appeal operating as a supersedeas, and was pending in the supreme court at the time the application for injunction was heard in the circuit court. Chetwood had appeared in the supreme court, and he and Thomas had both filed briefs in support of the validity of the order adjudging Thomas insolvent. On this appeal the supreme court of California subsequently held the insolvency proceedings valid.

On the 19th day of March, 1895, Stateler appeared in the superior court of the city and county of San Francisco and moved in the case of Chetwood *vs.* The California National Bank of San Francisco *et al.* to have what remained of the fund on deposit there turned over to him as the agent of the bank, so that it might be distributed among the shareholders of the bank under the advice and direction of the United States circuit court, as provided by the act of August 3, 1892. This motion was opposed by Chetwood. No other stockholder took any part in it, and there was no appearance on behalf of the bank. Chetwood claimed that the money should not be turned over to Stateler to be distributed among the shareholders of the bank, but that he, Chetwood, was entitled to use and expend it for the purpose of commencing such actions as he should deem proper and in employing attorneys thereabouts to collect the judgment against Thomas—Thomas had not at that time appealed from the judgment—and in employing attorneys to oppose Stateler's motion to have the fund turned over to him, either in the superior court or on appeal to the supreme court of

the State, whereas Stateler, on the other hand, insisted that the money was paid into court for the bank by two of the defendants in the action in consideration of their release from further liability; that the judgment of dismissal was by consent and therefore non-appealable and therefore final, and that, the court having allowed plaintiff out of the fund his fees and costs incurred in the action, the balance belonged to the bank, and that as the statutory "agent" of the bank he was entitled to receive and distribute it as the law provided, and that the superior court had no power to divert this fund from the shareholders of the bank to the plaintiff, to be by him expended in attempts to collect a judgment of very doubtful value.

The superior court denied Stateler's motion. From this order Stateler appealed to the supreme court of the State, and the appeal was pending there at the time the application for injunction was heard.

The amended bill then charges that Chetwood was not acting in good faith in his claim that he wanted to collect the judgment, but that said claim was made for the purpose of enabling him to obtain further allowances out of the fund in the superior court for attorneys' fees, costs, and expenses; that unless prevented by the circuit court he would compromise the judgment against Thomas for some small sum in the same way that he had compromised the bank's claim against Thompson and Wilson, and in the event that the supreme court of the State should affirm the judgment against Thomas the bank would then be deprived of an asset which might thereafter become of value, provided Thomas was prevented from obtaining his discharge in insolvency. The bill also alleged that it was impossible for complainant to perform the duties of his office, for at every step taken to collect any of the assets of the bank, and there were numerous assets in the shape of outstanding choses in action and uncollected judgments, he was met by Chetwood with the proposition that he was not the duly elected, commissioned,

qualified, and acting agent of the bank and had no authority to act. The bill further alleged that Chetwood was bringing suits in the name of the bank to collect the various assets of the bank, and that what remained of the bank's assets was becoming involved in endless litigation; that Chetwood was insolvent and could not respond to any judgment that the bank might thereafter recover against him. The bill further alleged that the complainant was not in collusion with the said Richard P. Thomas, but was acting as a quasi officer of the United States, under the statutes of the United States, in the discharge of the duties of his office and in good faith, and asked for a decree adjudging him to be the duly elected, qualified, and acting agent of the bank, and as such exclusively entitled to have and receive in his custody and under his control all the moneys and property of the bank and to collect the outstanding indebtedness due to the bank, in whatever shape the same might be, and to have it adjudged that all the acts of the defendant bank through its alleged board of directors, as set forth in said amended bill, since the appointment of a receiver to take charge of its affairs, be adjudged null and void, and that its board of directors had no authority to take any action touching the affairs of the association, and that the bank, its directors, officers, and employés; the defendant Chetwood, his agents, servants, and each and every of their said attorneys, solicitors, and counsellors, be forever restrained from denying complainant's rights to the office of agent of said bank and his right as such to the exclusive control of the assets of the bank, and from commencing any further litigation against him as such agent, and from prosecuting or defending any action theretofore brought by them or either of them against the complainant as such or touching his right to said office and touching his exclusive right to collect the assets of the bank, except a suit then pending in the United States circuit court, brought by Chetwood in the name of the bank and in his own name against

complainant, and that they be enjoined from commencing any further suits to collect any outstanding debts due the bank, and particularly from attempting to collect the judgment so recovered against Thomas, and asked for an order to show cause why an injunction *pendente lite* should not issue and in the meantime a temporary restraining order.

The return of the defendants to this order to show cause is voluminous and consists of an argument why the injunction *pendente lite* should not issue, a history of the suit of Chetwood *vs.* The California National Bank *et al.* from Chetwood's point of view, and a history of various creditors' suits claimed to have been brought by him to collect the judgment against Thomas, and Stateler's actions thereabouts. It admits that at the time Chetwood settled with Thompson and Wilson he knew that Thompson, at least, was able to respond to any judgment that might be recovered against him. It admits that said settlement was made without consultation with the receiver, the comptroller, or any of the shareholders; but it claims that the settlement was made in the interests of the shareholders. The return then sets forth that Stateler was elected agent by the votes of the stock held and controlled by Thomas, and that he was elected agent for the purpose of putting a tool in the office who would be subservient to Thomas' control, and the claim is made that if this money in the State court is distributed to Stateler he will turn it over to the shareholders, and thus deprive Chetwood of the means to collect the judgment against Thomas. There is no denial in the return of Chetwood's insolvency, but there is a claim that he has acted in good faith throughout, nor is there any denial of the allegation that the receiver submitted the administration of the bank's affairs to the Federal court eighteen months before Chetwood commenced his suit in the State court.

There were some rebuttal affidavits upon the part of the complainant, in which all charges of bad faith upon the part of Stateler are denied.

These were the facts before the circuit court on the hearing of the order to show cause why an injunction *pendente lite* should not issue.

The three propositions to be decided by that court before an injunction could issue were:

I.

Were the defendants doing or threatening to do the acts sought to be enjoined?

II.

Were those acts the proper subject for an injunction?

III.

Had the court the jurisdiction to issue the injunction?

There was no dispute as to the fact that the defendants were doing and threatening to do the acts sought to be enjoined. The respondents contended, however, that the act of August 3, 1892, authorizing the election of an agent by a majority of the shareholders of an insolvent national bank, and thus taking from the control of the board of directors the affairs of the bank, was unconstitutional; that, even if the act were constitutional, Stateler had not been properly elected "agent," for the reasons that the majority of the stock that had elected him was owned by one of the directors against whom, along with the other two defendants, the court had ordered a judgment to be entered for damages; that some of the stock that voted for Stateler was not fully paid as to an assessment which the comptroller had levied during the receivership, and that some of the stock had been transferred on the books of the bank, after the bank had closed its doors, to the names of the parties who voted it for Stateler at the meeting; and, further, that

even if the act were constitutional, and even if Stateler were the duly elected, commissioned, qualified, and acting statutory agent of the bank, yet, having been elected such agent by the stock of one against whom a large judgment was about to be rendered in favor of the bank, such election necessarily must have been collusive, and that the party so elected was an improper person to act as agent.

The converse of these various propositions was claimed on behalf of the complainant, and it was further claimed by him that none of these matters could be properly inquired into upon the hearing of said order to show cause why an injunction *pendente lite* should not issue for the following reasons:

I.

The association having been duly adjudicated insolvent by the Comptroller of the Currency, in the exercise of his discretion under the act of June 30, 1876, the election by a majority of the stockholders of the bank of the complainant as the agent of the bank, under the act of August 3, 1892, was a direct result of the exercise of such discretion, and that the attempt in that suit to attack complainant's title to his office was an attempt to set aside said election by the minority stockholders, and to set aside such election against the express wish of the vote of the majority of the shareholders at the meeting at which complainant was elected agent, and was therefore an attempt to review the discretionary action of the head of a bureau of the United States Government, which was not within the jurisdiction of the court.

II.

The bank having been duly adjudicated insolvent by the Comptroller of the Currency in the exercise of his discretion, the association no longer had the legal capacity to sue to set aside the result of the exercise of that discretion.

III.

The right of complainant to exercise the office of agent could not be inquired into in that action for the additional reason that the defense, if allowed and substantiated, would in itself operate as an injunction against the appointed officer of the United States from performing a duty imposed upon him by a United States statute, viz., to collect the assets of the association, convert them into money under the orders of the Federal court, and, after payment of the expenses of the trust, to divide the proceeds among the stockholders.

It was also claimed by the complainant that when the receiver had applied to the Federal court, in the course of the administration of the estate of the insolvent bank, eighteen months before Chetwood had commenced his action in the State court, for orders authorizing him to sell the property of the bank, such application to a court of competent jurisdiction being required by the United States statute before the receiver could dispose of any of the assets, the court to which such application was made thereby acquired exclusive jurisdiction over the *res* of the bank; that from that time the Federal court had the power and it was its duty, through the administration, to enjoin all parties from interfering, in the State court or otherwise, with such receiver or his successor, the "agent," in performing the duties of his office; that from and after the time the comptroller had adjudged the bank insolvent the board of directors of the bank became incompetent to act, and that no subsequent action upon their part could oust the Federal court of its jurisdiction to wind up the affairs of the bank through the receiver or his successor, the statutory "agent;" that from and after the adjudication no one could use the name of the bank in litigation except the receiver of the bank or his successor, the "agent;" that when Thompson and Wilson had paid the $27,500 into the State court as a consideration for their

release from their liability to the bank, and judgments of dismissal had been entered in that action in their favor, which judgments were entered at their request and by their consent, that said judgments were non-appealable and final, and all litigation as to that fund thereupon ended; that when the court allowed Chetwood out of that fund a sum of money for his attorneys' fees and costs in the prosecution of the stockholders' suit, and when that sum had been paid, it thereupon became the duty of the State court to turn over the balance of the fund to the statutory "agent," so that he could bring it into the Federal court and distribute it among the shareholders of the bank, as provided by law, and that if the bank, through its officers, or Chetwood, through his attorneys, opposed the turning over of that fund to the "agent," they would be acting against the interests of the shareholders and in open defiance of the jurisdiction of the Federal court; and, further, that the complainant's title to the office of agent should not be questioned in any other court than in the court which had obtained original jurisdiction over the administration of the affairs of the bank, to which administration the "receiver" and the "agent" were necessary parties.

Sharon *vs.* Terry, 36 Fed., 365.

In deciding to grant an injunction *pendente lite* the circuit court (Beatty, J.) held that from and after the time the receiver had applied to the Federal court for an order to sell the personal property of the bank no one had the right to interfere with the "receiver" or his successor, the "agent," in the discharge of the duties of his office, and that from that time no one but the receiver or his successor could use the name of the bank in litigation. The court also held that the complainant was the duly elected, qualified, and acting "agent" of the bank, and enjoined the defendants and their attorneys from raising that question in any action except the one in which the injunction was

granted, and from making any further application to the State court for an allowance out of the fund there, and from commencing any further litigation against the agent, or using the name of the bank, or from collecting any of the debts due the bank, but exempted from the operation of said injunction the two appeals then pending in the supreme court of the State of California.

On the 22d day of July, 1896, the supreme court of the State of California reversed the judgment recovered by Chetwood against Thomas and ordered a judgment to be entered by the superior court in favor of the defendant Thomas. In reaching this conclusion, that court assumed for the purpose of the decision, without deciding, that the complaint was sufficient to state a cause of action in its averments of misconduct and in its averments of a demand and refusal to prosecute upon the comptroller, the receiver, and the corporation itself, but expressly stated that its silence in its opinion on those matters as well as on other objections raised by the appellant was not to be construed as a determination of them, and thereupon reversed the judgment on the grounds, first, that the case made out by the findings was not the case made out by the pleadings; second, that the findings were not responsive to the issues; and, third, that the cause of action sounded in tort, and that the release of Thompson and Wilson upon the payment of the $27,500 into court was a release of two tort-feasors, and that the release of two was a release of the third.

45 Pacific Reporter, 704.

No petition for rehearing was filed by the bank. Chetwood, however, filed a petition for rehearing within twenty days after the decision was rendered, as the rule required. This petition for rehearing was denied on August 21, 1896, and the remittitur issued to the superior court of the city and county of San Francisco on the following day, and a

judgment was entered in favor of Thomas and against Chetwood for his costs on appeal.

On the 7th day of August, 1896, the supreme court of the State reversed the order of the superior court, refusing to turn over the fund to Stateler as the statutory agent of the bank, holding that the question as to the regularity and validity of the proceeding of the shareholders, terminating in the election of Stateler as agent, and the assignment to him by the comptroller and receiver of the assets of the corporation, did not enter into the case, as he had received his commission as "agent" from the comptroller, and, under the statute of the United States, had succeeded the receiver in the matter of winding up the affairs of the bank, and that in the conduct of the trust he was placed under the direction and control of the United States circuit court, and that as such "agent" he was at least a quasi officer of the United States, and the regularity of his appointment could not be raised upon collateral attack in the State court in the case of Chetwood *vs.* The California National Bank. That court also held that upon the payment of the money into court by Thompson and Wilson the litigation ended, and that the "agent" was thereupon entitled to receive the fund; but there was nothing in the record on Stateler's appeal to show that Chetwood had been allowed out of the fund his attorneys' fees and disbursements, and in directing the superior court to turn the fund over to Stateler the supreme court authorized the making of a reasonable allowance to the plaintiff for his costs, disbursements, and attorneys' fees in that action, as contemplated by law (45 Pac. Rep., 854). The bank did not petition for a rehearing. Chetwood, however, filed a petition, and on September 4th his petition for a rehearing was denied and the remittitur issued to the superior court of San Francisco on the following day.

Shortly after this the answer was filed, which was also introduced in evidence upon the hearing of the contempt

matter. It set forth that Stateler was not properly elected "agent" for the reasons urged on the hearing of the order to show cause why the injunction *pendente lite* should not issue; that Thomas was a man of large means and had gone into insolvency for the purpose of avoiding the payment of the judgment recovered by Chetwood; denied that Chetwood had proceeded in this matter from a selfish point of view, but asserted that whatever he had done was done and performed for the purpose of protecting the assets of the bank. There is no denial in the answer of the facts upon which the court had found that the Federal court had acquired original jurisdiction over the affairs of the bank, nor are those matters in any way referred to.

On October 12th, under leave of the court, Stateler filed his supplemental bill, which was also introduced in evidence, setting forth the reversals of both appeals in the supreme court as above stated.

Upon the coming down from the State supreme court of the remittitur on the Stateler appeal, Stateler moved the superior court to have the fund turned over to him in accordance with the decision of the supreme court of the State. This motion was met by Chetwood with an application for a further allowance out of the fund for attorneys' fees and costs. Upon the attention of the superior court being called to the fact that the Federal court had enjoined Chetwood and his attorneys from applying for any further allowance out of the fund for attorneys' fees and costs, the superior court refused to proceed with the motion, but continued it for two weeks, in order to give Chetwood an opportunity to apply to the circuit court and have the injunction modified in that regard. He therefore, accordingly, on the 7th day of October, 1896, filed an affidavit in the United States circuit court and gave notice of motion, returnable October 12, for an order modifying the injunction, so as to permit him to make a further application for attorneys' fees and costs. Stateler resisted this motion, claiming that Chet-

wood had not acted in good faith in the matter, and in support of the claim produced a certified copy of the order of the superior court, in which the insolvency proceedings of Thomas were pending, which order was made by the court of its own motion, removing Chetwood, among other reasons, for filing a fraudulent claim against the estate of the insolvent amounting to $14,000. The United States circuit court refused to modify the injunction. The papers used on the motion to modify the injunction and the order thereon were also introduced in evidence in the contempt proceedings.

On the 16th day of October Stateler presented his affidavit in the cause to the United States circuit court, which affidavit called the attention of the court to the fact that, notwithstanding the fact that the circuit court had refused to modify its injunction so as to permit Chetwood to apply to the State court for a further allowance out of the fund, Chetwood had failed to withdraw his previous application for attorneys' fees, and, upon that affidavit, the court issued its first order to show cause why Chetwood and his attorneys of record in the suit in the State court, namely, Thompson & Thompson and E. G. Knapp, should not be adjudged guilty of contempt for violating the injunction. Before this matter was heard, however, Stateler presented his second affidavit to the United States circuit court and asked for an order to show cause why Chetwood and his attorneys should not be further punished for contempt in violating the injunction *pendente lite*. This last affidavit showed that on the 24th day of September, 1896, a writ of error had been allowed by Mr. Justice Field to the supreme court of the State to review its order reversing Chetwood's judgment against Thomas, and that in order to obtain this writ of error Chetwood had a petition filed in the name of the bank, as the plaintiff in error, and caused himself and Thomas to be made sole defendants in error. This petition was signed by Knapp and Thompson as the attorneys for

the bank. That after the circuit court had refused to modify its injunction, so as to permit Chetwood to apply to the superior court for a further allowance for attorneys' fees and costs out of the fund there, Chetwood and the officers of the bank had caused to be presented to the chief justice of the State of California a petition for a writ of error to review in this court the order of the supreme court of the State on Stateler's appeal and entitled the proceeding as follows: "The California National Bank of San Francisco and John Chetwood, Jr., representative stockholder therein, plaintiffs in error, *vs.* T. K. Stateler, agent; S. P. Young, receiver; Robert A. Wilson, Robert R. Thompson, and Richard P. Thomas, defendants in error," and that the petition was signed by Knapp as the attorney for the plaintiffs in error. The petition set forth, among other things, that Stateler was not the duly elected, qualified, and commissioned agent of the bank, and sought to have this court determine that question in the suit brought in the State court, a question which the United States circuit court had enjoined Chetwood and the bank from raising in any other case than in the case brought by Stateler against them, then and now pending in said circuit court. The affidavit further set forth that the writ of error operated as a supersedeas, and by reason of the action of the defendants in suing out said writ the "agent" could not obtain possession of the fund.

Upon the hearing of these two orders to show cause before the circuit court, it was contended on behalf of the complainant, as to the first order to show cause, that Chetwood and his attorneys, Thompson & Thompson and E. G. Knapp, had violated the injunction *pendente lite, first,* in applying to the superior court for a further allowance out of the fund there belonging to the bank; *second,* in failing to withdraw their motion immediately upon the refusal of the circuit court to modify the original injunction. As to this order, the attorneys claimed and the court found that they were

not guilty of contempt, as they had announced their willingness to withdraw said motion as soon as their attention was called to the injunction. Chetwood was found guilty, as above stated, but it appeared that after the order to show cause had been issued the motion had been withdrawn and he was sentenced to pay the costs of the proceeding, which were nominal.

It was contended on behalf of the complainant, as to the second order to show cause, that the defendant Chetwood, his attorneys, A. W. Thompson and E. G. Knapp, and Vanderslice, the president of the defendant bank, had willfully violated the injunction *pendente lite*—

I.

In suing out the writs of error at all.

II.

In suing out the writs of error in the name of the bank.

III.

In suing out the writ of error to review the record on Stateler's appeal, even if they had the right to use the name of the bank, when the suing out of such a writ was for the purpose of preventing the fund in the State court from being brought into the Federal court, and to that end raising the question in the State court as to Stateler's right to exercise the office of duly elected, qualified, and commissioned "agent," the injunction enjoining them from raising that question in any other than the circuit court.

IV.

In suing out the writ of error to review the record on Stateler's appeal, irrespective of the fact whether an injunction had or had not issued to prohibit them from doing so,

when the suing out of such writ was for the purpose of preventing the fund in the State court from being brought into the Federal court, and to that end raising the question in the State court as to Stateler's right to exercise the office of "agent," the exclusive jurisdiction of the circuit court over the determination of that question having attached prior to the jurisdiction of the State court.

As to this order, A. W. Thompson claimed that his name had been signed to the petition for the first writ of error, the only one upon which his name appeared, without his knowledge or consent. The court thereupon acquitted him of the charge of contempt. Vanderslice, the president of the bank, claimed that he had never been served with the injunction; that he had been confined to his house for some months with sickness, and the court acquitted him of the charge of contempt. The court also found that Knapp, although he signed the petition for the writ of error to review the action of the State court on appeal from the judgment, was not aware, at the time that he had so signed it, of the injunction of the Federal court, and he was therefore acquitted as to that writ of error. He was found guilty of a willful violation of the injunction, however, in signing his name as the attorney of record for the plaintiff in error to the petition for the writ of error to review the record of the State court on Stateler's appeal. Chetwood, as above stated, was adjudged guilty of contempt in suing out both writs of error.

It is respectively submitted on behalf of the respondents that the finding of the Federal court that both Chetwood and Knapp were guilty of contempt was within the jurisdiction of the court, and that its further order commanding them to dismiss the writ of error in reference to the Stateler appeal, and to refrain from further using the name of the bank as to the writ of error on the Thomas appeal, was the proper order for the Federal court to make. If the court had jurisdiction to issue the injunction, it clearly follows

that it had jurisdiction to punish as a contempt the willful violation thereof and to enforce the obedience of the injunction, which, if it meant anything, meant that the administration of the insolvent bank was to be carried on through the "agent" under the advice and direction of the Federal court; that the litigation as to the possession of the fund in the State court had, as a legal proposition, ended when the suit had been dismissed as to the parties who paid the fund into court, and the plaintiff stockholder had received an allowance therefrom for his costs and expenses; but as the superior court had refused to turn the fund over to the Federal officer, and the latter had appealed from the action of the superior court to the supreme court, the Federal court would permit Chetwood to prosecute his defense to said appeal in said State supreme court, but, anticipating that the decision of that court would be in favor of the Federal officer, prohibited the defendants from making any further opposition to the turning over of said fund, and directed them in case they had any claim against the fund to present their claim to the "agent," and further meant that Chetwood could prosecute his stockholders' suit against Thomas to final determination, if he so elected, but that the funds of the bank should not be used in the further prosecution of said suit.

As to the legal propositions before the circuit court on the hearing of the contempt matter and as to the grounds upon which they were adjudged guilty of contempt:

I.

In suing out the writs of error at all.

The suing out of both writs of error was the commencement of "further litigation" in the name of the bank, which, although a nominal defendant, had never taken any part on either appeal in the supreme court of the State. The bank was not even represented on said appeal. No

briefs were filed on behalf of the bank, and the petition for rehearing was filed on both appeals by Chetwood only. We have here a case where the writs of error are sued out in the name of a party who did not appear and defend the action in the court whose action is sought to be reviewed on the writ of error.

The writ of error must be brought in the name of the person who appeared to defend the action.

"The Burns," 9th Wallace, 237.

In Jenkins *vs.* First International Bank, 106 U. S., 572, this Court has held that the suing out of a writ of error is *new* litigation. That decision was on error to the supreme court of the State of Illinois, and it may be claimed that this Court decided that the writ of error was *new* litigation for the reason that the supreme court of Illinois had held that a writ of error was the beginning of a new suit; but, whether or not the suing out of a writ of error is the commencement of new litigation when sued out by the party who appeared in court whose action is sought to be reviewed, it clearly will not be contended that it is not new litigation when sued out by a party who did not appear in the action in the court whose record is sought to be reviewed.

Whether it is *new* litigation or whether it is *further* litigation, it was a willful violation of the injunction, and if the circuit court had jurisdiction to issue the injunction, then the contempt is clear.

II.

In suing out said writs of error in the name of the bank.

The violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court.

High on Injunction, section 866.

The injunction must be obeyed in good faith according to its spirit—a negative and passive obedience is not enough.

Neal *vs.* Osborne, 15 Howard's Pr., 81.

Wheeler *vs.* Gilsey, 34 Howard's Pr., 139.

While it is true that the injunction in so many words fails to say "You shall not use the name of the bank," yet the very proposition before the circuit court on the hearing of the application for injunction was, "Who is entitled to use the name of the bank—the 'agent' or the board of directors of the corporation?" and the court held that Stateler was the only one authorized to use it.

III.

In suing out the writ of error to review the record on Stateler's appeal, even if they had the right to use the name of the bank, when the suing out of such a writ was for the purpose of preventing the fund in the State court from being brought into the Federal court, and to that end raising the question in the State court as to Stateler's right to exercise the office of duly elected, qualified, and commissioned "agent," the injunction enjoining them from raising that question in any other than the circuit court.

The question as to whether or not Stateler was the agent of the bank was never in the case in the State court. It is true that when Stateler went into the State court and asked to have the fund turned over to him, Chetwood filed an affidavit, in which he set forth that Stateler had not been properly elected agent; but the supreme court of the State in deciding that appeal very properly said (12 Pacific Reporter, 854) that whether he was the *de jure* or *de facto* agent, he was in possession of his commission from the comptroller, "reciting his appointment and the regularity of the proceedings attending it," and the question as to the regularity of his appointment could not be raised upon a col-

lateral attack in that action. The only court in which that question could be raised, if it ever could be raised in any court, was the Federal court, because its jurisdiction was exclusive.

IV.

In suing out the writ of error to review the record on Stateler's appeal, irrespective of the fact whether an injunction had or had not issued to prohibit them from doing so, when the suing out of such writ was for the purpose of preventing the fund in the State court from being brought into the Federal court, and to that end raising the question in the State court as to Stateler's right to exercise the office of "agent," the exclusive jurisdiction of the circuit court over the determination of that question having attached prior to the jurisdiction of the State court.

Interference with the receiver in the discharge of his duties is a contempt of the court having jurisdiction over the receiver, although no injunction has been issued expressly forbidding such interference.

Davis *vs.* Gray, 16 Wallace, 203.

Irrespective of any injunction in the case, there was a receiver, whose duty it was to take into his possession the funds of the bank and distribute them among the shareholders. If the fund in the State court belonged to the bank, the receiver was entitled to take it into his custody, and had the right to enjoin the defendants from further opposing him in his efforts to obtain the custody of that fund.

We, of course, admit that the shareholder who sues on behalf of the corporation is entitled to control the litigation until a final determination thereof. When the $27,500 was paid into court by Thompson and Wilson in settlement of their liability, the cause of action against Thomas was wiped out, for the simple reason that the suit was in tort

against three tort-feasors, and the release of any one released the others. Upon the payment of that fund all litigation then and there ended, and the agent was entitled to have the proceeds of it after the plaintiff stockholder had been allowed his costs and expenses. He had already been allowed more than one-third of the fund for his costs and expenses, and the matter was finally settled. Any further costs or expenses he claims to have incurred he should receive no allowance for whatever. By his own act he extinguished the largest asset the corporation had, and his opposition towards turning the money over to the agent of the bank was not in the interest of the shareholders of the bank, but a selfish interest of his own.

It must be admitted that the tying up of this fund in the State court and the attempt to have that fund appropriated in paying Mr. Chetwood's expenses for prosecuting the writs of error to review the action of the supreme court of the State on Thomas' appeal is an interference with the receiver in the discharge of his duty, and the receiver was entitled to have that fund before the writ of error was sued out.

We submit that there has been a willful violation of the injunction *pendente lite* of the Federal court; that the Federal court had the power and it was its duty to punish for a violation of that injunction as a contempt, and that the Federal court has the power to enforce the obedience of its own writs, and that as a portion of the sentence for contempt in commanding Chetwood and his attorney of record here to dismiss the writ of error sued out of the supreme court of the State of California to review the Stateler appeal, and to refrain from using the name of the bank in prosecuting the other writ of error, the Federal court has not only acted within its jurisdiction, but has maintained the supremacy of its own writ. There is no attempt to prevent this tribunal from finally reviewing the question as to whether or not Stateler is the duly elected, commissioned, qualified, and acting agent of the bank; but, as Judge Morrow, in deciding

the order to show cause, stated, "that question, in my judgment, cannot be determined in that way; that is the question involved in this case here; that question must be determined in this case, and whichever way the court determines it an appeal will lie from such determination to either the court of appeals or the Supreme Court of the United States; that is the proper way to have that question determined. I cannot consent that the same issues shall be carried forward in two different actions, one in the State court and one here. A multiplicity of suits must be prevented, and in doing so that question should only be raised and determined here."

Chaffee *vs.* Quidnick Co., 13 R. I., 442.

It is respectfully submitted that the order to show cause should be discharged.

ROBERT BRENT MITCHELL,
Counsel for Respondent.